TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 217

ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD, ET AL., PETITIONERS

vs.

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 24, 1950.

CERTIORARI GRANTED OCTOBER 9, 1950.

No. 12120

United States
Court of Appeals
for the Ninth Circuit

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS and MRS. MABLE L. PRICE,

Appellants,

vs.

ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD, JAMES E. DOGGETT and RALPH BAKER,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

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For Appellees Collins, Lord, Doggett and Baker:

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the Southern District of California, Central Division

No. 8004-Y

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS, and MRS. MABEL L. PRICE,

Plaintiffs.

vs.

ORVILLE COLLINS, H. C. BURKHEIMER, STANLEY LORD, JAMES E. DOGGETT, RALPH BAKER, and JOHN DOE I to XXV,

Defendants.

AMENDED COMPLAINT FOR DAMAGES UNDER FEDERAL CIVIL RIGHTS ACT

I.

The plaintiffs and each of them are citizens of the United States and residents of the County of Los Angeles and within this judicial district; at all times herein, the plaintiffs have been and are members of the Crescenta-Canada Democratic Club, the plaintiff Hugh Hardyman being Chairman of the Program and Publicity Committee of said club, the plaintiff Mrs. Emerson Morse being Chairman of said club, and the plaintiff Mrs. Tosca Cummings being former Secretary thereof.

Said Crescenta-Canada Democratic Club is a voluntary association, being a political club, and is an official club duly organized and chartered by the Los Angeles County Democratic Central Com-

mittee and as such is an officially recognized club of the Democratic Party; said club was organized and exists for the [2] purpose of participating in the election of officers of the United States, including the President of the United States, the Vice-President of the United States, and members of the Congress of the United States, (including Representatives in the House of Representatives of the United States and in the Senate of the United States); and said club was further organized and exists to petition the national government for redress of grievances and to engage in public meetings for the discussion of national public issues by its members, as citizens of the United States, including the external and international policies of the United States.

II.

The defendants are residents of the County of Los Angeles and within this judicial district. John Doe I to XXV are residents of the County of Los Angeles and within this judicial district; at all times set forth herein they participated in, and cooperated in, carrying out, the unlawful conspiracy entered into and carried out by the hereinabove named defendants, as will appear more particularly hereinbelow.

When the true names of said defendants are known to the plaintiffs, they will ask leave of court to amend their complaint and insert said true names.

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III.

Pursuant to the purpose of the Crescenta-Canada Democratic Club aforesaid, said club has held public meetings in the City of La Crescenta from time to time; and said club scheduled and arranged for a regular public meeting in the City of La Crescenta under the auspices of said club for the evening of November 14, 1947; said public meeting was scheduled to be addressed by David Leff, a former official of the United Nations Relief and Rehabilitation Administration, to speak on the external policy of the United States, his subject being: "The Cominform and the Marshall Plan." At said public meeting said subject aforesaid [3] was scheduled for public discussion by those attending said meeting; and was additionally scheduled to be the subject of a resolution to be hereinafter set forth.

Prior to said meeting, said club had the practice and custom of adopting resolutions on national issues at its regular public meetings aforesaid; and said custom and practice included forwarding said resolutions to appropriate officers of the United States.

With respect to the foreign policy of the United States, and specifically with respect to the Marshall Plan, as a specific phase of said United States foreign policy, said club had, prior to said November 14, 1947, adopted the policy of opposing said Marshall Plan; and pursuant to said policy, said club had from time to time, adopted resolutions criticizing said Plan, and had petitioned the Gov-

ernment of the United States for a redress of grievances with respect to said Plan by forwarding said resolutions to the President of the United States, the State Department, and members of the Congress of the United States.

With further reference to said public meeting scheduled for said November 14, 1947, said club, through its officers, intended to present a resolution for adoption at said meeting opposing said Marshall Plan, pursuant to the policy aforesaid of said club; and said club, through its officers, further intended and planned to forward said resolution, by way of a petition for a redress of grievances, to the President of the United States, to the State Department of the United States and to the members of the Congress of the United States.

IV.

Prior to said November 14, 1947, the defendants and each of them knew of the proposed and scheduled meeting aforesaid and the purposes of said meeting, as aforesaid.

A few days prior to said November 14, 1947, and on a [4] date to the plaintiffs unknown, said date being peculiarly within the exclusive knowledge of the defendants, the defendants made and entered into an unlawful conspiracy, and they did conspire to deprive the plaintiffs as well as the members of said Crescenta-Canada Democratic Club, as citizens of the United States, of privileges and immunities, as citizens of the United States, of the rights peaceably to assemble for the purpose of discussing and

communicating upon national public issues, namely, the external and international policies of the United States, and to petition the national government for a redress of grievances pertaining to said external and international policy of the United States, as aforesaid.

Said defendants further unlawfully conspired to deprive the plaintiffs as well as the members of said club, as citizens of the United States, of equal privileges and immunities under the laws of the United States, as aforesaid, in that, to the knowledge of said defendants, many public meetings had been scheduled and held in the County of Los Angeles prior to said November 14, 1947, and resolutions were adopted thereat, which said public meetings were scheduled and held, and which resolutions had been adopted, by groups and organizations, with whose opinions on international issues said defendants agreed. With respect to the meetings of said groups and the adoption by them of resolutions, aforesaid, the defendants knowingly did not interfere with said meetings and said resolutions, or conspire so to do. With respect to the meeting aforesaid on November 14, 1947, however, the defendants conspired to interfere with said meeting for the reason that the defendants opposed the views of the plaintiffs, and the views of said club, and of its members upon the external policy of the United States; and the defendants conspired, as aforesaid, to interfere with the adoption and transmission of a resolution by said club upon said subject; as aforesaid, for the reason that said defend-

ants opposed the views to be set forth in said resolution. [5]

Said defendants further conspired to go in disguise upon the highways of the City of La Crescenta and upon the premises of said meeting-place in said City of La Crescenta, said disguise consisting of the unlawful and unauthorized wearing of caps of the American Legion.

V.

Pursuant to the conspiracy aforesaid and to carry out its purposes and its terms and solely for said purposes, the defendants and each of them did disguise themselves by the unlawful and unauthorized wearing of caps of the American Legion and did proceed on the highways of the City of La Crescenta in said disguise and did proceed to the premises of said meeting in said City of La Crescenta in said disguise; and, upon arriving at the premises of said public meeting in said City of La Crescenta aforesaid, by threats of force and by the use of force, did assault and intimidate the plaintiffs and those present at said meeting; and the defendant H. C. Burkheimer did push and shove the plaintiff Hugh Hardyman; and the defendants did order the plaintiffs and all persons present at said meeting to break up said meeting and to leave the premises of said meeting-place, against the will and consent of the plaintiffs and those present at said meeting; and the defendants did thus prevent, in addition, the adoption and transmission of the resolution, scheduled to be adopted at said meeting

upon the Marshall Plan, as aforesaid; and the defendants thus did interfere with the right of the plaintiffs to petition the Government for a redress of grievances pertaining to said Marshall Plan, as aforesaid.

VI.

This court has jurisdiction under the provisions of 28 U.S. Code Section 41 (12) and 8 U.S. Code Section 47 (3); and 28 U.S. Code Section 41 (1), in that the cause of action herein arises under the Constitution of the United States and under statutes of the United States, to wit: 8 U.S. Code Section 47 (3) [6] and 28 U.S. Code Section 41 (12) and the controversy herein exceeds, exclusive of interest and cost, the sum of Three Thousand ($3,000.00) Dollars.

VII.

As a result of the foregoing acts of the defendants and each of them, the plaintiffs were intimidated, feared serious bodily harm, and suffered humiliation, indignity and nervous shock, and were deprived of their constitutional rights as set forth hereinabove each, to their damage, in the sum of Five Thousand ($5,000.00) Dollars. The defendants and each of them acted wantonly, maliciously, and arbitrarily by virtue whereof the plaintiffs and each of them are entitled to punitive damages in the sum of Twenty Thousand ($20,000.00) Dollars.

Wherefore, the plaintiffs pray for judgment in favor of each plaintiff and against each defendant as follows:

The sum of Five Thousand ($5,000.00) Dollars as actual damages;

The sum of Twenty Thousand ($20,000.00) Dollars as punitive damages;

For cost of suit herein;

For such other relief as to the court is proper.

LOREN MILLER,
EDMUND COOKE,
MORTIMER VOGEL,
THELMA HERZIG,
WILLIAM B. ESTERMAN,
JANE GRODZINS,
A. L. WIRIN,
By /s/ A. L. WIRIN,
Attorneys for Plaintiffs.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Jul 1, 1948. [7]

[Title of District Court and Cause]

MOTION AND NOTICE OF MOTION TO DISMISS AMENDED COMPLAINT

To: Plaintiffs, Hugh Hardyman, Mrs. Emerson Morse, Mrs. Tosca Cummings, and Mrs. Mabel L. Price, and to their attorneys, Loren Miller, Edmund Cooke, Mortimer Vogel, Thelma Herzig, William B. Esterman, Jane Grodzins and A. L. Wirin:

You and Each of You will please take notice that on September 20, 1948, at 10:00 a. m. or as soon thereafter as counsel can be heard, defendant, H. C. Burkheimer, will move that the above-cap-

troned matter be dismissed on the ground that the complaint fails to state a cause of action within the jurisdiction of this Court.

Dated this 20th day of July, 1948.

/s/ AUBREY N. IRWIN,
Attorney for Defendant, H. C. Burkheimer. [9]

POINTS AND AUTHORITIES

I.

The Complaint Fails to State a Cause of Action Within the Purview of 8 USCA 47 (3) the Controlling Statute.

The extent of the plaintiffs' rights in this case are defined and circumscribed by 8 USCA 47 (3).

"Rights and immunities created by or dependent upon the constitution of the United States can be protected by Congress. The form and the manner of protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide."

United States vs. Rewes, 92 U. S. 214.

8 USCA 47 (3) is a statute very limited in scope. It deals with two categories of conspiracies by individuals:

(1) A conspiracy wherein the conspirators contemplate going in disguise to deprive an individual of rights protected by the Fourteenth amendment to the Constitution; (2) A conspiracy directly to interfere with the campaign for and election of federal officeholders.

The statute goes no further, and the statement of facts alleged in the complaint does not state a cause of action within the scope of that statute.

(a) The Court can take judicial notice of the fact that one is not disguised when he wears an American Legionnaire's cap.

> "Disguise: A dress or exterior put on to conceal or deceive . . ." "To change the guise or appearance of especially to conceal by an unusual dress." [10]
>
> 27 Corpus Juris Secondum 146

(b) There are no facts alleged which show that the defendants interfered with the support or advocacy by the plaintiffs in favor of the election of any federal officeholder.

II.

8 USCA 47 (3) Was Not Intended to Apply to Such Matters as the Case at Bar.

"Until 1875, save for the limited jurisdiction conferred by the Civil Rights Acts, infra, federal courts had no original jurisdiction of actions or suits merely because the matter in controversy arose under the Constitution or laws of the United States; and the jurisdiction then and since conferred upon the United States has been narrowly limited."

Hague vs. C.I.O., 307 U.S. 496, 507

"The statutes which appellant seeks to invoke were passed shortly after the Civil War to aid in

the enforcement of the Thirteenth Amendment abolishing slavery, the Fourteenth Amendment prohibiting State action, the effect of which would be to abridge the privileges or immunities of citizens of the United States or to deprive any person of life, liberty or property without the due process of law or to deny any person the equal protection of the law, and the Fifteenth Amendment prohibiting the denial of the right to vote on account of race or color. See Buchanan vs. Warley, 245 U. S. 60, 78, 38 S. Ct. 16, 62, L. E. 149; L.R.A. 1918 C, 210, Ann. Cas. 1918 A., 1201. The statutes were intended to provide for redress against State action and primarily that which discriminated against individuals within the jurisdiction of U. S. Hague vs. C.I.O., 307 U. S. 496, 509-514, 595 S. Ct. 954, 83 L. Ed. 1473; Hodges vs. U. S. 203 U. S. 1, 14-20, 27 S. Ct. 6, 51 L. Ed. 65; Logan vs. U. S., 144 U. S. 263, 290, [11] 291, 12 S. Ct. 617, 36 L. Ed. 429. The statutes, while they granted protection to persons from conspiracies to deprive them of the rights secured by the Constitution and laws of the United States (U.S. vs. Mosley, 238 U. S. 383, 387, 388, 35 S. Ct. 904, 59 L. Ed. 1355) did not have the effect of taking into federal control the protection of private rights against invasion by individuals (citing cases). The protection of such rights and redress of such wrongs was left with the States."

Love vs. Chandler, 124 F 2d 785

III.

The Plaintiffs' Complaint Fails to State Facts Showing That a Federally Protected Right Was Invaded.

The plaintiffs apparently have attempted to state a cause of action which would conform to the dictum in United States vs. Cruickshank, 92 U. S. 542, 552 to the effect that the right of people to assemble and discuss issues of national importance and to petition for a redress of grievances is a right which is an attribute peculiar to national citizenship, as contrasted with those rights which are regarded as inherent in all free men. If such be the intention of the plaintiffs, their complaint does nothing more than allege an interference with their right peaceably to assemble, not a right of national citizenship according to the Cruickshank case.

See Generally:

Allen vs. Corsano, 56 Fed. Supp. 169

Hodges vs. U. S., 203 U. S. 1

Logan vs. U. S., 144 U. S. 263

(Acknowledgment of Service.)

[Endorsed]: Filed July 20, 1948. [12]

[Title of District Court and Cause]

MOTION AND NOTICE OF MOTION TO DISMISS AMENDED COMPLAINT

To: Plaintiffs Hugh Hardyman, Mrs. Emerson Morse, Mrs. Tosca Cummings, and Mrs. Mabel L. Price and to their attorneys, Loren Miller, Edmund Cooke, Mortimer Vogel, Thelma Herzig, William B. Esterman, Jane Grodzins and A. L. Wirin:

You and Each of You will please take notice that on September 20, 1948, at 10:00 a. m. or as soon thereafter as counsel can be heard, defendants Orville Collins, Stanley Lord, James E. Doggett and Ralph Baker will move that the above-captioned matter be dismissed on the ground that the complaint fails to state a cause of action within the jurisdiction of this Court.

GEORGE PENNEY,
ROBERT M. NEWELL,
THEODORE A. CHESTER,
By /s/ ROBERT M. NEWELL,
Attorneys for Defendants. [14]

POINTS AND AUTHORITIES

I.

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"The statutes which appellant seeks to invoke were passed shortly after the Civil War to aid in the enforcement of the Thirteenth Amendment abolishing slavery, the Fourteenth Amendment prohibiting State action, the effect of which would be to abridge the privileges or immunities of citizens of the United States or to deprive any person of life, liberty or property without the due process of law or to deny any person the equal protection of the law, and the Fifteenth Amendment prohibiting the denial of the right to vote on account of race or color. See Buchanan vs. Warley, 245 U. S. 60, 78, 38 S. Ct. 16, 62, L. E. 149; L.R.A. 1918 C, 210, Avn. Cas. 1918 A., 1201. The statutes were intended to provide for redress against State action and primarily that which discriminated against individuals within the jurisdiction of U.S. Hague vs. C.I.O., 307 U. S. 496, 509-514, 595 Ct. 954, 83 L. Ed.

1473; Hodges vs. U. S. 203 U. S. 1, 14-20, 27 S. Ct. 6, 51 L. Ed. 65; Logan vs. U. S., 144 U. S. 263, 290, [16] 291, 12 S. Ct. 617, 36 L. Ed. 429. The statutes, while they granted protection to persons from conspiracies to deprive them of the rights secured by the Constitution and laws of the United States (U.S. vs. Mosley, 238 U. S. 383, 387, 388, 35 S. Ct. 904, 59 L. Ed. 1355) did not have the effect of taking into federal control the protection of private rights against invasion by individuals (citing cases). The protection of such rights and redress of such wrongs was left with the States."

Love vs. Chandler, 124 F 2d 785.

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See Generally:

Allen vs. Corsano, 56 Fed. Supp. 169.

Hodges vs. U. S., 203 U.S. 1

Logan vs. U. S., 144 U.S. 263

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed July 28, 1948. [17]

[Title of District Court and Cause]

OPINION

Appearances:

Loren Miller, Edmund Cooke, Mortimer Vogel, Thelma Herzig, William B. Esterman, Jane Grodzins, A. L. Wirin, Attorneys for Plaintiffs, Los Angeles, California. George Penney, Robert M. Newell, Attorneys for Defendants, Los Angeles, California. [19]

Yankwich, District Judge:

I.

THE CIVIL RIGHTS STATUTE AND ITS IMPLICATIONS

The action is instituted under the first clause of Subdivision (3) of Section 47 of Title 8 U.S.C.A., which reads:

"If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of de-

priving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more [20] persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

The object of this enactment is to give to persons injured as the result of the three types of conspiracies it designates, a claim for damages against the participants.

The section is implemented by Subdivision 1 of Section 1343 of Title 28 U.S.C.A., in effect September 1, 1948, which is a re-codification of Section 41

(12) of the old Title 28 U.S.C.A., which, in turn, reads:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 47 of Title 8."

It is beyond dispute that the Government of the United States may exercise, within the limits of its sovereignty, [21] and upon the soil which is a part of the United States, its powers and functions. (1)

From this flows the power of the Congress of the United States to secure, through criminal or civil sanctions, the protection of the rights which the Constitution guarantees to individuals. The scope of such legislation and the type of the rights to the protection of which it may be directed, is well stated in In re Quarles and Butler (2):

"The United States are a nation, whose powers of government, legislative, executive and judicial, within the sphere of action confided to it by the Constitution, are supreme and paramount. Every right, created by, arising under, or dependent upon the Constitution, may be protected and enforced by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most

eligible and best adapted to attain the object. United States vs. Logan, 144 U.S. 293.

"Section 5508 of the Revised Statutes provides for the punishment of conspiracies 'to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or [22] laws of the United States, or because of his having so exercised the same.'

"Among the rights and privileges, which have been recognized by this court to be secured to citizens of the United States by the Constitution, are the right to petition Congress for a redress of grievances; United States v. Cruickshank, 92 U.S. 542, 553; and the right to vote for presidential electors or members of Congress; Ex. parte Yarbrough, 110 U.S. 651; and the right of every judicial or executive officer, or other person engaged in the service, or kept in the custody, of the United States, in the course of the administration of justice, to be protected from lawless violence. There is a peace of the United States, In re Neagle, 135 U.S. 1, 69; United States v. Logan, above cited."

II.

NATIONAL OR STATE RIGHTS

We thus find recognition of the following as rights, privileges and immunities stemming from the Constitution of the United States: The right of assembly and to petition the Congress for redress of grievances; (3) the right to discuss national legislation or national affairs (4); the right to vote for presidential electors and members of the Con-

gress (5); the right to protection of person, while in the custody of an [23] officer of the United States (6); the right to engage in a profession such as the practice of law before federal courts (7); the right to move from state to state (8).

At the same time, invasions of purely personal rights, the protection of which is within the domain of state power, does not come under the protective shield of general national sovereignty or of statutes such as the Civil Rights Statute, a portion of which is under consideration here. (9) The following rights are in this category: protection against violence when not in the custody of a federal officer (10); the right of employment (11); the right to exercise freedom of the press (12); the right to testify before a grand jury (13); the right to employment by public bodies (14). The case last referred to contains a very succinct summary of the holdings we have just epitomized:

"The statutes which the appellant seeks to invoke were passed shortly after the Civil War to aid in the enforcement of the Thirteenth Amendment abolishing slavery, the Fourteenth Amendment prohibiting State action the effect of which would be to abridge the privileges or immunities of citizens of the United States or to deprive any person of life, liberty or property without due process or to deny any person the equal protection of the law, and the Fifteenth Amendment prohibiting the denial of the right to vote on account of race or color. See Buchanan v. Warley, 245 U.S. 60, 78, [24] 38 S. Ct. 16, 62 L. Ed. 149, L.R.A.

1918C, Ann. Cas. 1918A, 1201. The statutes were intended to provide for redress against State action and primarily that which discriminated against individuals within the jurisdiction of the United States. Hague v. Committee for Industrial Organization, 307 U.S. 496, 509-514, 59 S. Ct. 954, 83 L. Ed. 1423; Hodges v. United States, 203 U.S. 1, 14-20; 27 S. Ct. 6, 51 L. Ed. 65; Logan v. United States, 144 U.S. 263, 290, 12 S. Ct. 617, 36 L. Ed. 429. The statutes, while they granted protection to persons from conspiracies to deprive them of the rights secured by the Constitution and laws of the United States (United States v. Mosley, 238 U.S. 383, 35 S. Ct. 904, 59 L. Ed. 1355), did not have the effect of taking into federal control the protection of private rights against invasion by individuals. Hodges v. United States, 203 U.S. 1, 14-20, 27 S. Ct. 6, 51 L. Ed. 65; Logan v. United States, 144 U.S. 263, 282-293; 12 S. Ct. 617, 36 L. Ed. 429. The protection of such rights and redress for such wrongs was left with the States." (Emphasis added.)

Inherent in the problem before us is the view that, as a rule, civil rights

> "cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs or judicial or [25] proceedings." (15)

This is not to say that the Congress may not, in the exercise of its constitutional power, give a right of action against individuals who conspire to interfere with the exercise of purely national rights.

We postulate that it may, and so stated at the hearing. But, in considering whether it did so in the particular instance, the language of the statute must be considered in the light of these rulings. It is to be noted that, while Section 1343 of Title 28, U.S.C.A. (the jurisdictional section) speaks of "deprivation of any right or privilege of a citizen of the United States," the section creating the substantive rights (16) is narrower. It makes the right of action stem from conspiracy aiming to deprive a person "of the equal protection of the laws, or of equal privileges and immunities under the law." (Emphasis added.)

The qualifying word "equal" presupposes State action. For, as said by the Supreme Court in the Civil Rights cases (17):

"The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An [26] individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or

use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the State alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon [27] some State law or State authority for its excuse and perpetration."

Otherwise said, only the State, or those acting or assuming to act in its behalf, can interfere with the equal protection of law or be guilty of acts amounting to a denial of equal privileges by discriminating against an individual or group. When it does so, it breeds inequality. But when an individual interferes with the rights of another, we are in the domain of private right.

And, unless the act denounced is in aid of State action, which results in deprivation of equality, the wrong is a private wrong,—assault, battery, trespass, or the like,—and not within the statute.

This conclusion is reinforced by the fact that "equal protection of the laws" implies guarantee by the State, not by individuals, acting in dissociation from state power. (18)

Illustrative are the recent restrictive covenant cases. The Supreme Court, while denying judicial aid to their enforcement, does not question their validity as contracts between individuals. (19) This serves to emphasize the fact that, while in the realm of civil rights, the recent decisions of the Supreme Court have inaugurated what two recent historians of constitutional law have called "a new era in civil liberties" (20), the change of approach has meant chiefly the staying of the hand of official arbitrariness or refusal to grant judicial sanction to agreements grounded on inequality. But the same court has hesitated to create a new tort liability even in favor of the government, in the absence of direct congressional [28] authorization. (21)

III.

THE PLEADINGS IN SUMMARY

We now consider the motion to dismiss the amended complaint on file. The basis for the motion is that the amended complaint does not state a claim under Section 47(3) of Title 8 U.S.C.A., or show that a federally protected right was invaded.

In summary, the allegations of the amended Complaint are these:

Plaintiffs are members of the Crescenta-Canada Democratic Club in Los Angeles County, Plaintiff Hardyman being the Chairman of the Program and Publicity Committee, Plaintiff Morse, chairman of the Club and Plaintiff Cummings former secretary. The Club is a political club organized by the Los Angeles County Democratic Central Committee and is an officially recognized club of the Democratic Party.

Among its purposes are participation in the election of the Officers of the United States, including the President, Vice President, and Members of the Congress. It has, as other objects, the petitioning of the national government for redress of grievances and holding public meetings for the discussion of national issues by the members as citizens of the United States.

The defendants also reside in the same County and in our judicial district.

The Club held public meetings from time to time and [29] a public meeting was scheduled in the City of La Crescenta for the evening of November 14, 1947, which was to be addressed by David Leff, a former official of the UNRRA. He was to speak on the external policy of the United States, under the title of "The Cominform and the Marshall Plan." Public discussion was to follow, and it was proposed that the topic would be the subject of a resolution. Prior to the scheduled meeting on November 14th, the Club had adopted a policy of opposition to the Marshall Plan, and had, from time

to time, adopted resolutions criticizing the plan and petitioned

> "The Government of the United States for a redress of grievances with respect of said Plan by forwarding said resolutions to the President of the United States, the State Department, and members of the Congress of the United States."

It was intended to present a resolution of similar import at the scheduled meeting. The defendants, prior to the date, and knowing of the proposed meeting, entered into a conspiracy to deprive the plaintiffs and the members of the Crescenta-Canada Democratic Club

> "as citizens of the United States, of privileges and immunities, as citizens of the United States, of the rights peaceably to assemble for the purpose of discussing and communicating upon national public issues, namely, the external and international policies of the United States, [30] * * * Defendants further unlawfully conspired to deprive the plaintiffs as well as the members of said club, as citizens of the United States, of equal privileges and immunities under the laws of the United States, * * * in that, to the knowledge of said defendants, many public meetings had been scheduled, and held in the County of Los Angeles prior to said November 14, 1947, and resolutions were adopted thereat, which * * * public meetings were scheduled and held, and which resolutions had been adopted, by groups and

organizations, with whose opinions on international issues * * * defendants agreed."

While the defendants had not interfered with the prior meetings and resolutions, the amended Complaint states that they conspired specifically with regard to the meeting of November 14, 1947, because they were opposed to the views of the plaintiffs and of the club and its members. So the object of the conspiracy was to interfere with the adoption

> "and transmission of a resolution by (the) club upon (the) subject, * * * for the reason that (the) defendants opposed the views to be set forth in (the) resolution."

In addition to the conspiracy just mentioned, the amended Complaint states that the defendants also conspired [31]

> "to go in disguise upon the highways of the City of La Crescenta and upon the premises of (the) meeting place in said City of La Crescenta, (the) disguise consisting of the unlawful and unauthorized wearing of caps of the American Legion."

So disguised, the defendants proceeded on the highways of La Crescenta to the premises where the meeting was held. Arriving there, they assaulted and intimidated the plaintiffs and those present at the meeting. The defendant Berkheimer pushed and shoved the plaintiff Hardyman. All the defendants ordered the plaintiffs and all persons present at the meeting to break up the meeting and to leave the premises against the wills of the plain-

tiffs and of those present at the meeting. By such action, they prevented, in addition, the adoption and transmission of the resolution and interferred with the rights of the plaintiffs to petition the Government for a redress of grievances pertaining to the Marshall Plan.

Damages by reason of intimidation, fear of bodily harm, humiliation and indignity are sought in the sum of $5000.00. And, because, it is averred, the actions of the defendants were wanton, malicious and arbitrary, punitive damages in the amount of $20,000.00 are asked.

IV.

NO DISGUISE

Before gauging these allegations by the principles discussed in the first portion of this opinion, we dismiss [32] from consideration the allegation of disguise. The clause of the section (22) dealing with disguise uses the word in its ordinary sense in which the contemporaneous organization at which it was directed,—the Ku Klux Klan—acted, that is, concealment of identity by masks and vestments which covered the entire or part of a person's body to such an extent as to make identification impossible.

The verb "disguise" is defined as follows:

"(1) To change the style of dress of; formerly to dress (oneself) in outlandish, unfamiliar or fantastic fashion; now, to change the customary dress or appearance of; so as to conceal one's identity or counterfeit another's; as, to disguise oneself as

a servant; the costume disguised her. * * * (3) To hide or obscure the true nature or character of, by altering appearances or distinguishing quality: to conceal by misrepresentation or counterfeiting; to cloak, mask, as, to disguise anger, one's sentiments, the taste of quinine." (23)

The noun "disguise" means:

"* * * (2) Unfamiliar or characteristic style of dress or apparel assumed to conceal one's identity; as a king in disguise. Hence that which is used to conceal one's identity or counterfeit another's; specif., a player's or masker's costume, etc; as grotesque disguises at a masquerade. (3) Any outward form, which, intentionally or not, misrepresents [33] the true nature or identity of a person; or thing; a deceptive appearance; as blessings in disguise; also pretense or pretentious appearance; artifice or insincerity, esp. in manners, speech, etc., as, to throw off all disguise; hence any misleading lack of correspondence between appearance and reality; deception; speciousness. 'Without fear or evil or disguise'" (24)

Historically, the meaning has remained unchanged since the 16th Century. (25) This is also the legal meaning of the word. (26)

The wearing of the caps of the American Legion, whether authorized or unauthorized,—which is the only form of disguise charged—does not constitute disguise.

So the sufficiency of the amended Complaint must be determined under the conspiracy clause of the section involved.

V.

VIOLATION OF NATIONAL RIGHT?

The conspiracy clause is unrelated to disguise, it being an alternative to it.

We again advert to the fact that in the cases which have interpreted the civil rights statute, in its various forms, from which this section derives (28), and in which recognition was given to certain rights as national in scope, either under the equal protection (29) or privileges or immunities (30) [34] clauses,—both of which are protected by the Fourteenth Amendment,—the deprivation or infringement of which the courts took cognizance were those of persons acting or claiming to act in official capacities as agents of public bodies,—states or state agencies or arms,—or individuals acting in concert with or in aid of agents or representatives of such public bodies. (31) We find them to be election officials (32) or other interfering with the right of suffrage of negroes (33), or a state guard (34) the mayor and other municipal officers of a city (35), the prosecuting attorney and the judge of a state court (36). No cases exist where an action either civil or criminal has been maintained against private persons who interfered with such rights. And, while the cases intimate that actions might be maintained if the allegations of a complaint showed the specific violation of a right, the cases in which the intimation was made were clearly race discrimination cases where the object was to prevent the exercise of civil rights

by persons of the negro race for whose benefit the Fourteenth Amendment to the Constitution was passed. (37) Granted that the rights secured by the Constitution, unlike those secured by the 14th and 15th amendement, are immune "against the action of individuals as well as of the States" (38), we are not concerned here with an attempt to secure from Governmental bodies as such or individuals acting or pretending to act under the protection of such bodies, obedience to constitutional command. What we must decide is whether a special remedy created by a special statute applies to individuals acting as such and preventing, not by authority real or [35] arrogated, but by threats and physical violence a meeting, the object of which was to discuss a national problem, and, at the conclusion of it, to submit for adoption a resolution relating to the foreign policy of the United States for forwarding to the State Department and others connected with the national government.

The amended Complaint does not allege that it was the aim of the conspiracy to prevent the plaintiffs from holding any meeting. On the contrary, it is stated that a prior meeting by the same group, at which similar resolutions were adopted, was not interfered with, although its objects were known to the defendants.

So we have, at most, a sporadic incident, consisting of a series of acts by which persons of certain political opinions, unrelated to race, are interfered with on the private property of an individual

by acts which, taking the statement of the amended Complaint at its full value, amount to and are punishable under the state laws as disturbances of the peace (39), assault (40), trespass (41), and are actionable as such.

VI.

NO REPOSITORY OF STATE POWER

Two conditions must concur before liability under the civil rights statute attaches: (1) There must be a violation of a national right, and (2) such violation must be by the State, one of its agencies, or persons, being or claiming to be, repositories of state power.

The acts complained of here, in their ultimate effect, are of the character which the Court in Love v. Chandler held [36] outside the purview of this statute. While the court there was dealing with the right of employment by the United States, the language used applies with great force to the situation here because it stresses the inapplicability of the statute to acts by individuals of the type here involved, and the fact that redress for violation of such rights must be sought under the state law. We quote:

"The appellant does not seek redress because the State of Minnesota is discriminating against him, or because its laws fail to afford him equal protection. We have already held that he had no absolute right under the laws of the United States to have or retain employment by the Works Progress Administration. The appellant seeks damages be-

cause certain persons, as individuals, have allegedly conspired to injure him and have injured him by individual and concerted action. The wrongs allegedly suffered by the appellant are assault and battery, false imprisonment, and interference with his efforts to obtain and retain employment with the Works Progress Administration. The protection of the rights allegedly infringed, and redress of the alleged wrongs are, we think within the exclusive province of the State. Compare Hodges v. United States, 203 U.S. 1, 27 S. Ct. 6, 51 L. Ed. 65; Carter v. Greenhow, 114 U.S. 317, 330, 5 S. Ct. 928, 29 L. Ed. 202, 207" (43). [37]

Implicit in these rulings is the fact that the chief aim of all the civil rights legislation is to implement the guarantee of equality of the Fourteenth Amendment. And there runs through the decisions the idea that what might be denial of such guarantee by the State or its agencies would not necessarily be a foundation for actionable liability when done by individuals. The Supreme Court has made this clear in the race restriction cases to which allusion has already been made. In Shelley v. Kraemer (45), the Court says:

"Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may

fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful. We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. Cf. Corrigan v. Buckley, supra." (Emphasis added.)

In the companion case (46), a similar interpretation is placed on the statute (47) which guarantees to all citizens [38] equal rights in the ownership and enjoyment of real property:

"We may start with the proposition that the statute does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms. The action toward which the provisions of the statute under consideration is directed is governmental action. Such was the holding Corrigan v. Buckley, supra." (48)

Back of these rulings is the historical fact that the equality which the Fourteenth Amendment sought to establish called for protection against discrimination by state action. As said by the Court:

"The historical context in which the Fourteenth Amendment became a part of the Constitution

should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind." (49) [39]

VII.

NO ACTION BY REPOSITORIES OF STATE POWER

These declarations have a special meaning and should have great weight in the solution of the problem which confronts us in this case. For they appear in cases which interpret a statute which antedates the adoption of the Fourteenth Amendment and by which the federal government placed its entire power behind a policy guaranteeing equality in the ownership, enjoyment and disposition of real property to all persons having national citizenship. And the Courts, in giving effect to the letter and spirit behind the policy, nullified state action both in the several states and in the District of Columbia contrary to its terms by insisting that the judicial arm should not aid persons entering into agreements violating the policy of the law. Yet, at the same time, the court declared unequivocally that the contracts which lay back

of the state action, i.e., the contracts for the enforcement of which judicial aid was sought,—were legal as between the parties themselves.

These two apparently antipodal conclusions can be harmonized only on the assumption that statutes seeking to carry into effect constitutional provisions directed against discrimination and denial of equality are, in the main, directed at those, who through exercise or abuse of official power, can make these guarantees nugatory. Rightly. For, while a person may, by his action toward another, deprive him of the enjoyment of a right, only persons exercising official power can, by their action, deprive the person of equal rights. For the essence of the constitutional [40] guarantees on that subject, as of other constitutional guarantees, is the assertion of rights against sovereign power and the limitation of sovereign power in the realm of those rights. The race restriction decisions which we are discussing are the most recent illustrations of this approach. For, if the broad contention of the plaintiffs were to prevail, and if it were laid down as an axiom that the infringement of any right guaranteed by federal statute or inherent in national citizenship on the basis of race or otherwise, by individuals conspiring to that end, comes within the purview of Subdivision 3 or Section 43 of Title 8, U.S.C.A., as a denial of equal protection of the laws or of equal privileges and immunities under the law, persons denied equality in the ownership, enjoyment or disposition of property

could seek redress by way of damages against the parties to such covenants. Such a construction would fly in the teeth of the declarations just referred to. For it is inconceivable that the Supreme Court would have declared, in so many words, these contracts to be valid between the parties agreeing to restrict the ownership of property within a district to certain groups, if it had intended to leave open the signatories of such contracts to actions for damages, under this statute, by any of the excluded persons. For a right of action depends on the concurrence of wrong and damage. And a loss arising from acts or conditions which do not create ground for legal distress is damnum absque injuria. (50) The Supreme Court must be assumed to have had these maxims in view when they declared the agreements between the parties, although unenforceable with the aid of the State. [41]

Of course, when speaking of a "wrong," we are excluding ethical considerations. We refer to wrongs in the legal sense only,—that is, wrongs cognizable in law and which may be the object of redress through the judicial process.

VIII.

CONCLUSION

In a complex world, legislative action may invade realms heretofore thought immune from interference, if the legislative body sees social harm in what may have theretofore been considered right

practice legally, morally, and socially. But, in applying a specific statutory enactment of the type under discussion here, we are not free to disregard the line of demarcation laid down by the courts between governmental action and actions by individuals, and adopt a construction which might turn every base manifestation of local prejudice, bigotry or discrimination, into a federal law suit.

We grant that the acts complained of, the occurrence of which is admitted by the motion to dismiss, inflicted a grievous wrong on the plaintiffs. Such acts are manifestations of that ignoble mob spirit which is so abhorrent to a free, decent and democratic society. They undermine due process and play into the hands of those who would destroy constitutional freedom. For they would substitute for freedom and order in society the momentary whim of an aroused and unruly group. They would substitute for a nation united, a nation divided into Spartans and helots. They would enthrone the mob as arbiter [42] of freedom. And I know of no more unsafe and unworthy repository of the rights of the individual. "Mob rule does not become due process of law," (44) by parading under the cloak of fidei defensor.

Notwithstanding this, acts of the character here involved are not a foundation for the legal liability sought to be invoked in this case.

It follows that the Complaint does not state a claim cognizable in this court.

The Motion to Dismiss will, therefore, be granted.

Dated this 4th day of October, 1948.

/s/ LEON R. YANKWICH,
Judge. [43]

NOTES TO TEXT

1. Ex parte Siebold, 1879, 100 U. S. 371, 394-395; In re Neagle, 1889, 135 U. S. 1, 68-69; Logan v. United States, 1892, 144 U. S. 263, 294-295.

In re Quarles & Butler, 1895, 158 U. S. 532, 535.

3. United States v. Cruikshank, 1875, 92 U. S. 542; In re Quarles & Butler, 1895, 158 U. S. 532, 535; Powe v. United States, 1940, 5 Cir., 109 F(2) 147.

4. Hague v. C.I.O., 1939, 307 U. S. 496.

5. Ex parte Yarbrough, 1884, 110 U. S. 651.

6. In re Neagle, 1889, 135 U. S. 169; In re Quarles & Butler, 1895, 158 U. S. 532, 535.

7. Green v. Elbert, 1894, 8 Cir., 63 Fed. 308; Mitchell v. Greenough, 1938, 9 Cir., 100 F(2) 184.

8. Twining v. New Jersey, 1908, 211 U. S. 79, 97; Crandall v. Nevada, 1867, 6 Wall. 35, 47; United States v. Wheeler, 1920, 254 U. S. 281, 299; and see, the concurring opinion of Mr. Justice Douglas in Edwards v. California, 1941, 314 U. S. 177, et seq.

9. 8 U.S.C.A. 47.

10. United States v. Harris, 1882, 106 U. S. 629.

11. Hodges v. United States, 1906, 203 U. S. 1.

12. Powe v. United States, 1940, 5 Cir., 109 F(2) 147.

13. United States v. Sanges, C. C. Ga., 1891 48 Fed. 78. [44]

14. Love v. Chandler, 1942, 8 Cir., 124 F(2) 785.

15. Civil Rights Cases, 1883, 109 U. S. 3, 17; and see, United States v. Harris, 1882, 106 U. S. 629, 643, where the Court uses this language:

"A private person cannot make constitutions or laws, nor can he with authority construe them, nor can he administer or execute them. The only way, therefore, in which one private person can deprive another of the equal protection of the laws is by the commission of some offence against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault or murder.

16. 8 U.S.C.A., Sec. 47(3).

17. Civil Rights Cases, 1883, 109 U. S. 1, 17-18.

18. They condemn, as does the Fourteenth Amendment, all use or abuse of power by "every person, whether natural or judicial, who is the repository of state power." Home Tel. & Tel. Co. v. Los Angeles, 1913, 227 U. S. 278, 286. And see, Hodges v. United States, 1906, 203 U. S. 1, 14; Truax v. Raich, 1915, 239 U. S. 33; Meyer v. Nebraska, 1923, 262 U. S. 390; West Virginia State Board of Education v. Barnette, 1943, 319 U. S. 624; Screws v. United States, 1945, 325 U. S. 91; Mendez v. Westminster School District, 1946, D. C.

Cal., 64 Fed. Sup. 544, per McCormick, J.; Westminster School District v. Mendez, 1947, 9 Cir., 161 Fed. (2) 774. [45]

19. Shelley v. Kraemer, 1948, 334 U. S. 1, 8-23; Hurd v. Hodge, 1948, 334 U. S. 24, 31. I advert to the fact that many years ago (in 1928), I declined, as a State Judge, to recognize such private agreements as covenants running with the land, and denied injunctive relief to enforce them, only to be overruled by the higher courts of California. See, Littlejohn v. Henderson, 1931, 111 Cal. App. 115. Which serves to emphasize the fact that a trial judge cannot "innovate at pleasure." (Cardoza; The Nature of the Judicial Process, p. 141.) Nor can he follow minority opinions. See my observations in re Lindsay-Stratmore Irr. District, 1937, D. C. Calif. 21 Fed. Sup. 129, 135; and in United States v. Standard Oil Co. et al, Supplemental Opinion, filed June 28, 1948.

Restrictive race covenants are a part of what a great foreign student of American institutions has called "The American Dilemma." See, Gunnar Myrdall, The American Dilemma, 1944. On the historical phase of the whole problem, see Leon Whipple, The History of Civil Liberties in the United States, 1928, pp. 169-209: Osmond K. Fraenkel, Our Civil Liberties, 1944, pp. 189-197. Mr. Fraenkel, who has been a leading exponent of civil liberties, both in thought and action, sums up the law on the cases arising under the privileges and immunities clause in this manner: [46]

"The constitutionality of such laws (laws which

would punish all persons participating in unlawful acts such as lynching) has been questioned since they punish not only state officials but private individuals as well, and the Supreme Court has repeatedly ruled that all the provisions of the Fourteenth Amendment guarantee protection against state action alone. Private wrongdoing may be punished by the states, not as a rule by the federal government." (Emphasis added)

20. Alfred H. Kelly and Winfred A. Harbison, The American Constitution, Its Origins and Development, 1938, pp. 790 et seq.

21. United States v. Standard Oil Co., 1947, 332 U. S. 301; The Circuit Court opinion is Standard Oil Co. v. United States, 1946, 9 Cir., 153 F(2) 958. And see my opinion in the same case, United States v. Standard Oil Co., 1945, D. C. Cal., 60 Fed. Sup. 807.

22. 28 U.S.C.A. 47(3).

23. Webster's Unabridged Dictionary, 1937, Edition, page 747, Col. 3.

24. Webster's Unabridged Dictionary, 1937 Edition, page 747, Col. 3.

25. See Shorter Oxford English Dictionary, 1933, Vol. I, p. 526.

26. Words and Phrases, Vol. 12, p. 695; 27 C.J.S., pp. 146-147.

27. 8 U.S.C.A. 47(3).

28. See cases cited in Notes 1-15. [47]

29. Constitution of the United States, Amendments V and XIV, Sec. 1.

30. Constitution of the United States, Art. IV, Sec. 2. Cl. 1.

31. In re Quarles & Butler, 1895, 158 U. S. 532; United States v. Sanges, 1891, D. C. Ga., 48 Fed. 78.

32. Ex parte Siebold, 1879, 100 U. S. 371; See also United States v. Classic, 1941, 313 U. S. 299, 315; Smith v. Allwright, 1944, 321 U. S. 649.

33. Ex parte Yarbrough, 1884, 110 U. S. 651.

34. Logan v. United States, 1892, 144 U. S. 263.

35. Hague v. C.I.O., 1939, 307 U. S. 496.

36. Mitchell v. Greenough, 1938, 9 Cir., 110 F(2) 184.

37. See cases cited in Notes 33, 34, 35, 36. And see, Allen v. Corsano, 1944, D. C. Del., 56 Fed. Sup. 169.

38. United States v. Classic, 1941, 313 U. S. 299, 315; and see Clyatt v. United States, 1905, 197 U. S. 207, 218.

39. Cal. Penal Code, Section 415 (disturbance of the peace of neighborhood or person); Section 403 (disturbance of public meetings).

40. Cal. Penal Code, Section 602(j) (illegal entry for the purpose of injuring property or property rights or interfering or obstructing lawful business of another).

41. Cal. Penal Code, Sections 240-241 (assault); sections 242-243 (battery). Among the corresponding civil sections relating to civil remedies are California Civil Code, Section 43 (guarantee against personal bodily harm or restraint); California Political Code, Section 51 [48] (defined as

citizens all persons born or residing within the state); California Code of Civil Procedure, Section 338(3) (action for trespass to real property may be brought within three years); section 340(3) (action for assault and battery may be brought within one year). And for the state civil rights provisions see California Civil Code, Sections 51-54.

42. Love v. Chandler, 1942, 8 Cir., 124 F(2) 785.

43. Love v. Chandler, 1942, 8 Cir., 124 F(2) 785, 787.

44. The phrase is that of Mr. Justice Holmes in his dissent, concurred in by Mr. Justice Hughes, in Frank v. Mangum, 1915, 237 U. S. 309, 347.

45. 334 U. S. 1, 13. It is revealing that as authorities for the statement underscored the court refers to United States v. Harris, 1883, 106 U. S. 629, and United States v. Cruikshank, 1876, 92 U. S. 542. So that there is no warrant for the contention that the language of these cases justifies a broad interpretation of the civil rights statutes which would make it a shield against all kinds of private wrongs which interfere with civil rights. (See Milton R. Konvitz, The Constitution and Civil Rights, 1947, pp. 97 et seq.)

46. Hurd v. Hodge, 1948, 334 U. S. 24.

47. 8 U.S.C.A., Sec. 42.

48. Hurd v. Hodge, supra, at p. 31.

49. Shelley v. Kraemer, supra, at p. 23.

50. Yankwich, Handbook on California Pleading and Procedure, 1926, Sec. 161.

[Endorsed]: Filed Oct. 4, 1948. [49]

[Title of District Court and Cause.]

ORDER ON MOTION TO DISMISS

The Motion of the Defendant, filed on July 20, 1948, to dismiss the amended Complaint, filed on July 1, 1948, heretofore heard, argued and submitted, is now decided as follows:

Upon the grounds stated in the Opinion filed this day, the said Motion to Dismiss is granted and the said amended Complaint is hereby dismissed.

Dated this 4th day of October, 1948.

/s/ LEON R. YANKWICH,
Judge.

Judgment entered Oct. 4, 1948. Docketed Oct. 4, 1948. Book 53, Page 364.

[Endorsed]: Filed Oct. 4, 1948. [50]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that plaintiffs Hugh Hardyman, Mrs. Emerson Morse, Mrs. Tosca Cummings, and Mrs. Mabel L. Price, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the Orders granting the Defendants' Motion to Dismiss and Dismissing the Amended Complaint entered in this action on October 4, 1948.

LOREN MILLER,
EDMUND COOKE,
MORTIMER VOGEL,
THELMA HERZIG,
WILLIAM B. ESTERMAN,
JANE GRODZINS,
A. L. WIRIN,
By /s/ FRED OKRAND,
Attorneys for Plaintiffs.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Oct. 13, 1948. [51]

In the District Court of the United States, Southern District of California, Central Division.

No. 8004-Y

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS, and MRS. MABEL L. PRICE,

Plaintiffs,

vs.

ORVILLE COLLINS, H. C. BURKHEIMER, STANLEY LORD, JAMES DOGGETT, RALPH BAKER, et al,

Defendants.

JUDGMENT DISMISSING ACTION ON MOTION OF DEFENDANTS

The motion of the above-named defendants for judgment of this court dismissing the above-entitled action, came on regularly to be heard this 20th day of September, 1948, Loren Miller, Edmund Cooke, Mortimer Vogel, Thelma Herzig, William B. Esterman, Jane Grodzins and A. L. Wirin, appearing on behalf of the plaintiffs, and George Penney, Robert M. Newell, Theodore A. Chester and Aubrey N. Irwin, appearing on behalf of the defendants, and after hearing the arguments of counsel and the Court being fully advised in the premises, and the case having been submitted;

And it appearing to the court that the action is instituted under the first clause of the Civil Rights Statute, and it further appearing to the court that the facts set forth in the amended com-

plain do not state a cause of action under the [53] Civil Rights Statute;

It, Is Therefore Adjudged and Decreed that the above-entitled action be and the same is hereby dismissed with prejudice.

Done this 28th day of October, 1948.

/s/ LEON R. YANKWICH,
Judge.

Approved as to form under Rule.

/s/ A. L. WIRIN

Judgment entered Oct. 29, 1948. Docketed Oct. 29, 1948. Book 53, Page 595.

[Endorsed]: Filed Oct. 28, 1948. [54]

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEAL

Notice is hereby given that plaintiffs Hugh Hardyman, Mrs. Emerson Morse, Mrs. Tosea Cummings, and Mrs. Mabel L. Price, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Orders granting the Defendants' Motion to Dismiss and Dismissing the Amended Complaint entered in this action on October 4, 1948 and from the Judgment entered on October 29, 1948.

LOREN MILLER.
EDMUND COOKE,
MORTIMER VOGEL,
THELMA HERZIG,
WILLIAM B. ESTERMAN,
JANE GRODZINS,
A. L. WIRIN,
By /s/ FRED OKRAND,
Attorneys for Plaintiffs.

(Affidavit of Service by Mail attached.)
[Endorsed]: Filed Nov. 3, 1948. [55]

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL AND PRAECIPE

Pursuant to Rule 75(f), Federal Rules of Civil Procedure, the parties in the above entitled action hereby stipulate that the following be the Record on Appeal and the Clerk of the above entitled Court is requested to prepare and certify same to the Court of Appeals for the Ninth Circuit:

1. Amended Complaint for Damages under Federal Civil Rights Act;
2. Motion and Notice of Motion to Dismiss Amended Complaint—filed on behalf of defendants Collins, Lord, Doggett, and Baker;
3. Motion and Notice of Motion to Dismiss—filed on behalf of defendant Burkheimer;
4. Order on Motion to Dismiss—dated [57] October 4, 1948;
5. Opinion of Hon. Leon R. Yankwich—filed October 4, 1948;
6. Notice of Appeal;
7. Judgment Dismissing Action on Motion of Defendants—entered October 29, 1948;
8. Amended Notice of Appeal;
9. This Stipulation and Praecipe.

LOREN MILLER,
EDMUND COOKE,
MORTIMER VOGEL,
THELMA HERZIG,
WILLIAM B. ESTERMAN,
JANE GRODZINS,
A. L. WIRIN,
By /s/ FRED OKRAND,
Attorneys for Plaintiffs.

GEORGE PENNEY,
ROBERT M. NEWELL,
THEODORE A. CHESTER,
By /s/ ROBERT M. NEWELL,
Attorneys for Defendants Collins, Lord, Doggett, Baker.

/s/ AUBREY N. IRWIN,
Attorney for Burkheimer.

[Endorsed]: Filed Dec. 3, 1948. [58]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 58, inclusive, contain full, true and correct copies of Amended Complaint for Damages Under Federal Civil Rights Act; Motion and Notice of Motion to Dismiss Amended Complaint of Defendant H. C. Burkheimer; Motion and Notice of Motion to Dismiss Amended Complaint of Defendants Orville Collins et al; Opinion; Order on Motion to Dismiss; Notice of Appeal; Judgment Dismissing Action on Motion of Defendants; Amended Notice of Appeal and Stipulation re Record on Appeal and Praecipe which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $15.20 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 9th day of December, A. D. 1948.

(Seal) EDMUND L. SMITH,
Clerk.

[Endorsed]: No. 12120. United States Court of Appeals for the Ninth Circuit. Hugh Hardyman, Mrs. Emerson Morse, Mrs. Tosca Cummings and Mrs. Mable L. Price, Appellants, vs. Orville Collins, H. D. Burkheimer, Stanley Lord, James E. Doggett and Ralph Baker, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 10, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit.

No. 12120

HUGH HARDYMAN, et al,

Appellants,

vs.

ORVILLE COLLINS,

Appellees.

STATEMENT OF POINTS ON APPEAL, AND DESIGNATION OF RECORD STATEMENT OF POINTS

1. The District Court erred in granting defendants' Motions to Dismiss the Amended Complaint;

2. The District Court erred in granting the Judgment dismissing the action on motion of defendants;

3. The District Court erred in holding that 8 U.S.C. 47(3) does not apply to individuals but applies only to action by state officials or those acting under color of state authority and that consequently the Amended Complaint stated no claim cognizable in that Court.

DESIGNATION OF RECORD FOR PRINTING

Appellants hereby designate for printing the entire record as certified to this court by the Clerk of the District Court.

LOREN MILLER,
EDMUND COOKE,
MORTIMER VOGEL,
THELMA HERZIG,
WILLIAM B. ESTERMAN,
JANE GRODZINS,
A. L. WIRIN,
FRED OKRAND,
By /s/ FRED OKRAND,
Attorneys for Appellants.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed December 22, 1948.

No. 12120

United States
Court of Appeals
For the Ninth Circuit

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS and MRS. MABLE L. PRICE,

Appellants,

vs.

ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD, JAMES E. DOGGETT and RALPH BAKER,

Appellees.

**Appeal from the United States District Court,
Southern District of California,
Central Division.**

**Proceedings Had in the United States Court of Appeals
for the Ninth Circuit**

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Wednesday, January 18, 1950.

Before: Healy, McAllister and Orr,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. A. L. Wirin, counsel for appellants, and by Mr. Loren Miller, for amicus curiae, National Association for the Advancement of Colored People, and by Mr. Robert Newell, counsel for appellees, and submitted to the court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, May 29, 1950.

Before: Healy, McAllister and Orr,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion and dissenting opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

In the United States Court of Appeals
for the Ninth Circuit

No. 12,120

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS and MRS. MABLE L. PRICE,

Appellants,

vs.

ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD, JAMES E. DOGGETT and RALPH BAKER,

Appellees.

Appeal from the United States District Court for the Southern District of California, Central Division

May 29, 1950

Before: Healy, McAllister,* and Orr, Circuit Judges.

Orr, Circuit Judge:

OPINION AND DISSENTING OPINION

Opinion

The trial court entered a judgment of dismissal of an amended complaint on the ground that it did not state a cause of action for damages under §

*Sixth Circuit, sitting by special designation.

47(3) of Title 8, U.S.C.A.[1] The correctness of that ruling is the subject of this appeal. The amended complaint, in substance, alleged that appellants are citizens of the United States and are members of the Crescenta-Canada Democratic Club. Appellant Morse is chairman of the club and appellant Hardyman is chairman of the program and publicity committee.

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[1] 8 U.S.C.A. § 47(3):

"Depriving persons of rights or privileges.

"(3) If two or more persons in any state or territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

The Crescenta-Canada Democratic Club, hereinafter called the club, is a voluntary association, duly organized and chartered by the Los Angeles County Democratic Central Committee and recognized officially as a Democratic club. Its claimed purposes were to participate in the election of officials of the United States, including the President, Vice-President and members of Congress; to petition the National Government for redress of grievances; to engage in public meetings for the discussion of national public issues, including the international and foreign policies of the United States.

Pursuant to a customary practice the club held regular public meetings in the City of La Crescenta at which affairs of national interest and importance were discussed and such action taken thereon as the members deemed advisable. The club arranged for and scheduled a public meeting in the city of La Crescenta for the evening of November 14, 1947, at which a named speaker was to discuss the foreign policy of the United States, including the Marshall plan. The discussion was to be participated in by the members of the club and others attending the meeting. It was also understood, that at said meeting a resolution would be presented opposing the Marshall plan with the understanding that such a resolution, if passed, would be forwarded to the President of the United States, the State Department and members of Congress. Said resolution was intended to be a petition for redress of grievances with respect to the Marshall plan. At previous meet-

ings similar resolutions had been adopted and forwarded to officials of the Government.

Appellees, having knowledge that a meeting of the club was to be held November 14, and also being informed of the program and purposes of said meeting, entered into a conspiracy to breakup said meeting and to prevent the adoption and transmission of the proposed resolution. In furtherance of such conspiracy appellees went to the building in which the meeting was being held, threatened to and did assault appellants, ordered those attending the meeting to leave and thus forced those in attendance to disperse and by threats and violence prevented those attending the meeting from adopting and transmitting the proposed resolution. Appellees had not conspired or interfered with public meetings held with the knowledge of appellees by organizations expressing views with which appellees agreed and at which resolutions were adopted respecting the foreign policies of the United States. The trial court held that § 47(3) of Title 8 U.S.C.A. does not sanction a cause of action against private individuals who interfere with the privilege of assembling to petition Congress and to discuss national affairs unless the interference is committed by the state or a person acting under authority thereof.

In short, the question presented is whether § 47(3) authorizes a civil suit for damages against private individuals for interfering, pursuant to a conspiracy, with an assemblage of citizens to discuss United States foreign policy and to petition the national government for redress of grievances.

This broad question embraces three issues: 1. Did Congress intend to create such a civil action by the enactment of § 47(3)? 2. If so, did Congress have constitutional power to do so? 3. Granted the constitutional power, is the statute a proper exercise thereof? We deal with the questions in the order named.

Intended Scope of § 47(3)

The District Court concluded that the statute was intended to give a remedy for deprivation of rights only by persons acting under color of state law. We think it embraces the deprivation of federal rights by private individuals and that such is the interpretation given the statute by the Supreme Court of the United States.

Section 47(3) begins: "If two or more persons in any state or territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, etc." The disguise portion of the statute, it is obvious, is not concerned with state officials and it is equally obvious that the words "two or more persons" cannot be read to mean only persons acting under color of state law when a simple conspiracy is involved and, at the same time, read to mean private individuals where there is a disguise. It will be noted that the statute also provides: "If two or more persons * * * conspire * * * for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws." It does not seem reasonable to con-

strue "two or more persons" to mean "state officials" as applied to that kind of conspiracy. The applicability of the statute to private individuals is reinforced by a reading of the section in its original context. 17 Stat. 13. 8 U.S.C.A. § 47 was originally § 2 of the Act of April 20, 1871. Section 1 of that Act was 8 U.S.C.A. § 43, which explicitly applies to deprivations of rights under color of state law. Had Congress intended both provisions to be applicable to state action, it would not have inserted that requirement in the first section and omitted it from the second.

The United States Supreme Court has held that a statute identical in part with § 47(3) was directed "exclusively against the action of private persons, without reference to the laws of the state or their administration by her officers, * * *." United States v. Harris, 1882, 106 U. S. 629, 640. The statute there involved described in identical language the conspiracies set forth in the first two clauses of § 47(3) and made such conspiracies a crime without the requirement of acts done in furtherance of the conspiracy set forth in the last clause of § 47(3).

The legislative history of § 47(3) further warrants the conclusion that it was intended to afford relief against acts of individuals. Although the Act embodying said section was entitled "An Act to Enforce the Fourteenth Amendment," it was the theory of Congress that the Fourteenth Amendment gave the federal Government power to protect individual civil rights against individual action. See,

Congressional Globe, 42nd Cong., 1st Sess., pp.367-68, 608-08, Appendix 68-69. As Representative Shellabarger, chairman of the House committee responsible for the bill, explained it, the provision in the Fourteenth Amendment that all persons born or naturalized in the United States are citizens thereof gave Congress the power to protect directly the privileges and immunities of United States citizens. He included in these privileges and immunities protection by the Government, the enjoyment of life and liberty, the right to acquire and possess property, etc., citing the passage in Corfield v. Coryell, 1823, 6 Fed. Cases No. 3230, quoted in the Slaughterhouse Cases, 1872, 83 U. S. 36, 76. See, Congressional Globe, supra, Appendix 69. That this theory of the scope of the Fourteenth Amendment has since been held invalid does not detract from its persuasiveness in determining congressional intent.[2]

The congressional debates reveal that the Act was intended to curb the activities of private individuals and, in particular, the Ku Klux Klan. Con-

[2]A further indication that Congress believed it had broad power to protect civil rights from individual action is found in other statutes passed during this period. U. S. v. Reese, 1875, 92 U. S. 214, and James v. Bowman, 1903, 190 U. S. 127, held unconstitutional two sections of the Act of May 31, 1870, which purported to make it a crime for individuals to interfere with the voting rights of others without limitation to the right to vote for federal offices. Hodges v. United States, 1906, 203 U. S. 1, and The Civil Rights Cases, 1883, 109 U. S. 3, also held unconstitutional statutes which protected personal rights to contract, sue, enter places of public accommodation, etc., from individual interference.

siderable criticism was aimed at the bill (which then included criminal as well as civil sanctions) because, it was thought, the federal Government would thereby be required to enter the field of punishing individuals for ordinary assault, trespass, etc. The answer was that the bill would only protect the citizen in such rights as he had under the federal Constitution and laws. Among such rights was the right to express opinions "on all subjects which are not against the good order of the Government in which we live." Congressional Globe, supra, 382-83. The enactment was designed to protect others in addition to racial minorities. Congressional Globe, supra, 391, 394, Appendix 166-67, 181.

The district court, in part, based its conclusion that the statute applied to state actions upon the word "equal". The reason given by Representative Shellabarger for using the word "equal" to describe the protected rights was "to confine the authority of this law to the prevention of deprivations which shall attack the equality or rights of American citizens; that any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section." Congressional Globe, supra, 478. Thus, the violation by an individual of a right which is enjoyed equally by other citizens is the denial of an "equal" privilege or immunity. Any such willful violation is inherently a purposeful discrimination against

the victim. There is not present the problem, which is present in cases of alleged denial of equal protection by state officials, of distinguishing between purposeful discrimination and mere erroneous application of a valid state law. See, e.g., Snowden v. Hughes, 1944, 321 U. S. 1.

We are aware of the recent cases which characterize § 47(3) as giving federal protection only against state action. Love v. Chandler, 8 Cir., 1942, 124 F. 2d 785; Viles v. Symes, 10 Cir., 1942, 129 F. 2d 828. Such a holding is contrary to a construction placed on similar language by the United States Supreme Court in the case of United States v. Harris, 106 U. S. 629.

It is apparent that Congress intended by § 47(3) to provide a federal civil action by private individuals against other individuals for the deprivation of personal rights, among which are the rights alleged in the complaint in the instant case. It is quite as apparent that the courts have substantially limited the protection intended, holding some of the expressed protection to be beyond the power of Congress to provide.

Constitutional Power of Congress to Redress the Acts Alleged in the Complaint

Dual rights exist under our federal system which the federal Government has power to protect. One set of rights, comprehended in the due process and equal protection clauses of the Fourteenth Amendment, as well as in the Fifteenth and Nineteenth

Amendments and certain portions of the original Constitution, is subject to federal protection only as against state action. Another much narrower set of rights is subject to federal protection from invasion by individuals. The existence of rights of federal citizenship, subject to federal protection, was recognized before the adoption of the Fourteenth Amendment in Crandall v. Nevada, 1867, 73 U. S. 35, wherein was recognized a federal right of free access to the seat of government. The concept of a dual system was set forth in the Slaughterhouse Cases, 1872, 83 U. S. 36, which distinguished the privileges and immunities of United States citizenship from those of state citizenship.

The delineation by the courts of the narrow area of rights which Congress has constitutional power to protect from individual invasion has developed through the application of what is now 18 U.S.C.A. § 241, originally enacted May 31, 1870. This statute has been applied to individual deprivations of the right to vote for federal offices, Ex Parte Yarborough, 1884, 110 U. S. 651; the right to enjoy the privileges granted by the homestead laws, United States v. Waddell, 1884, 112 U. S. 76; the right to protection from attack while in the custody of a federal marshal, Logan v. United States, 1892, 144 U. S. 263; and the right to inform federal officers of violations of federal law, In re Quarles and Butler, 1895, 158 U. S. 532, Motes v. United States, 1900, 178 U. S. 458. The cases also indicate by way of dictum

that the right to assemble for the purpose of discussing the policies of the federal Government and petitioning that Government for redress of grievances is within the scope of direct federal protection. In United States v. Cruikshank, 1876, 92 U. S. 542, the Supreme Court had before it an indictment under what is now § 241 charging the defendants with having deprived certain citizens of their right to assemble together peaceably with other citizens for a peaceful and lawful purpose. The court held that the indictment was insufficient because it did not charge that the attempted assembly was for a purpose connected with the national Government. But, the court went on to declare: "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy

was to prevent a meeting for any lawful purpose whatever." 92 U. S. 542, 552-53.

This passage has been repeatedly cited by the Supreme Court as establishing the right of assembly for national purposes as a federally protected right. See, Presser v. Illinois, 1886, 116 U. S. 252, 267; Logan v. United States, 1892, 144 U. S. 263, 286; In re Quarles and Butler, 1895, 158 U. S. 532, 535; Hague v. C.I.O. 1939, 307 U. S. 496, 513, 522. In Powe v. United States, 1940, 109 F. 2d 147, the Court of Appeals for the Fifth Circuit stated that it had no doubt that Congress had power to protect directly the rights of citizens to assemble peaceably to petition the federal Government for redress. The court also said: "Because the federal government is a republican one in which the will of the people ought to prevail, and because that will ought to be expressive of an informed public opinion, the freedom of speaking and printing on subjects relating to that government, its elections, its laws, its operations and its officers is vital to it." 109 F. 2d 147, 151.

We conclude that the rights alleged to have been violated in the instant case are within that narrow area of rights which Congress has constitutional power to protect from individual invasion. We do not think that such a holding necessitates the opening up of the federal courts to a multitude of private suits for trespass, assault and similar invasion of private rights which are within the competence of the states to protect. A representative government

cannot function properly unless its officers are informed of the opinions and desires of the people whom they represent. To protect the right to assemble for the purposes alleged in this case is to keep open those vital channels of communication between government and the governed. This protection is within the power granted Congress by Article I, § 8: "To make all laws which shall be necessary and proper for carrying into execution * * * all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Constitutionality of the Statute as Applied to the Complaint

In the above discussion we have held that Congress intended, in enacting § 47(3), to give an action against individuals for infringement of individual civil rights, including the right to assemble and petition the federal Government for redress of grievances, a right alleged in the complaint to have been violated. We have also held that this right is within the narrow area of rights which Congress has constitutional power to protect directly. It is finally necessary to determine whether § 47(3) is so drawn as to be a proper exercise of this constitutional power.

In United States v. Harris, 1882, 106 U. S. 629, certain defendants had been indicted for conspiring to deprive certain persons in the custody of a state sheriff of equal protection of the laws by assaulting

them, etc. The indictment was under a statute (R. S. § 5519), which described in identical language the conspiracies set forth in the first two clauses of § 47(3) and made such conspiracies a crime without the requirement of acts done in furtherance of the conspiracy, set forth in the last clause of § 47(3).

The statute was struck down because of its breadth. Sec. 5519 provided against the deprivation of "equal protection of the laws or equal privileges or immunities under the laws." This provision was broad enough to encompass both federal and state laws and as to state laws Congress was without power to legislate.

In Baldwin v. Frank, 1887, 120 U. S. 678, the Supreme Court held that the provisions of § 5519 were not severable, saying: "A single provision, which makes up the whole section embraces * * * those who conspire to deprive one of his rights under the laws of a state, and those who conspire to deprive him of his rights under the Constitution, laws or treaties of the United States."

We find within § 47(3) a provision which does not embrace rights under state law. While the language used in § 47(3) is identical with that used in § 5519 from the beginning of § 47(3) to the word "laws" in the eighth line thereof, said § 47(3) then goes on to require that there be an act in furtherance of the conspiracy "whereby another is injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States." Of course, the provision relative to injury

to person or property is subject to the same constitutional infirmity as the Supreme Court found in § 5519. However, that portion of § 47(3) which makes actionable a deprivation of a right or privilege of a citizen of the United States relates solely to a federal right and is clearly severable.

We conclude that Congress has the constitutional power to protect against invasion of federal rights by private individuals. Congress has exercised that power by enacting § 47(3). The allegations of the complaint are sufficient to invoke the provisions of said section.

There exists an understandable reluctance to open the doors of federal courts for the redress of grievances inflicted by one set of individuals upon another lest those courts be flooded with actions that should properly be left to the states. We do not think the narrow compass of federally protected rights set up in § 47(3) will permit of such a result. If it does, and the load becomes too burdensome, it then becomes a matter with which the Congress must deal.

Judgment of dismissal reversed.

Dissenting Opinion

Healy, Circuit Judge, Dissenting

I am in general agreement with the opinion of the trial judge, 80 F. Supp. 501, although possibly I have approached the case from a different angle.

The statute involved, 8 USCA § 47, had its origin

in section 2 of the Act of April 20, 1871, 17 Stat. 13, entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes." In the Revised Statutes of 1873[1] section 2 of that Act so far as it provides civil remedies was extensively rearranged and became § 1980. As will later appear, the penal sanction embodied in section 2 was at that time transferred to the title denominated "Crimes." For the moment it is enough to say that 8 USCA § 47 is identical in wording, arrangement and subdividing with § 1980. Apparently the clause of subdivision (3) thereof, presently of importance, has been construed in but two cases, Love v. Chandler, 8 Cir., 124 F. 2d 785, and Viles v. Symes, 10 Cir., 129 F. 2d 828, in both of which it was regarded as giving federal protection against state action only.

Omitting all matter not material to this case, § 47(3) reads: "If two or more persons in any State or Territory conspire[2] * * *, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth

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[1]Statutes at Large, Vol. 18, p. 348.

[2]The portion of the opening clause referring to the going "in disguise on the highway or on the premises of another" is immaterial here, appellants having expressly abandoned any claim of reliance on that phrase.

in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

The clause descriptive of the conspiracy forms the heart of this inqury and therefore merits closer scrutiny than I think my associates have given it. It is notable that the phraseology employed is formal and abstract rather than particular or concrete, whereas the contrary is the case in respect of all other conspiracies outlined in § 47. The crucial verbiage is "for the purpose of *depriving,* either directly or indirectly, any *person* or *class* of persons of the *equal protection of the laws,* or of *equal privileges and immunities under the laws.*" The similarity of the verbiage I have italicized to the wording of Section 1 of the Fourteenth Amendment shows that Congress, in choosing its language, was thinking immediately in terms of that Amendment and its vindication.[3] As my associates observe, the

[3]The language of the Amendment is that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

congressional debates display a belief (later determined to be erroneous) that the Fourteenth Amendment bestowed on the national government power by legislation to protect the civil rights of persons against individual as well as state invasion; and it is but just to assume that this belief inspired the distinctive language of the clause now under examination. The insuperable difficulty one finds in the way of applying the clause to any action other than such as may be taken under color of state authority seems directly traceable to these circumstances.

We should know now, I believe, that in the constitutional sense it is not within the competence of private persons, whether acting singly or in concert, to deprive others of the equal protection of the laws or of equal privileges under the laws. Only action taken under state aegis is capable of effectuating that. Private individuals may conspire to impede, hinder, interfere with, or interrupt the free exercise of a constitutionally protected right or privilege, and it is within their capacity to take effective steps in the furtherance of such a conspiracy. But individual action of this sort can be taken only by conduct violative of state law, such for example as trespass, assault, intimidation, riotous tumult or the enforced dispersal of public assemblages—all of these being wrongs which, in the absence at any rate of suitable federal legislation, the state alone is competent to punish or redress, or by the exercise of its police power to prevent.

That this is so was long ago pointed out by the Supreme Court in the Civil Rights Cases, 109 U. S.

3, 17. The Court said: "The wrongful act of an individual, unsupported by any such [state] authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be

responsible, was the great seminal and fundamental wrong which was intended to be remedied."

It will be helpful at this juncture to turn to the case of United States v. Harris, 106 U. S. 629, from which, curiously enough, my associates appear to derive comfort. As I said earlier, the penal sanction of section 2 of the Act of April 20, 1871, was transferred to the "Crimes" title on adoption of the Revised Statutes. This provision afforded criminal penalties for engaging in conspiracies of the sort described in the section; and in the revision it became § 5519, shown below.[4] It was this section that was before the Court in United States v. Harris, supra, and was there held invalid as being beyond the authority of Congress. My brothers say it was struck down because of its breadth, that is, because it encompassed indiscriminately invasions of state as well as federal rights. This view is superficial and only partially correct. Apparently it is based on the

[4] "Sec. 5519. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

Court's passing approval of the holding in United States v. Reese, 92 U. S. 214. The objectionable sweep of the statute, as I understand the opinion, was by no means the sole or even the major ground upon which its invalidity was predicated.

For the Court to sweep away the statute because the particular offense charged in the case was beyond federal competence seems wholly out of character, like throwing the baby out with the bath. Primarily it appears to have been thought unconstitutional because "directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers" [p. 640]. Later in the opinion [p. 643] the Court remarked that if Congress has power to punish a conspiracy of this character, it can punish the act itself whether done by one or more persons. "A private person," said the Court, "cannot make constitutions or laws, nor can he with authority construe them, nor can he administer or execute them. The only way, therefore, in which one private person can deprive another of the equal protection of the laws is by the commission of some offence against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault, or murder," all of which were thought to be offenses solely within state competent. In this passage one discerns the embryo of the philosophy much more adequately developed in the Civil Rights Cases, supra. Clearly, the Harris decision renders highly dubious even the constitutionality of the statute before us.

My brothers rely extensively on the judicial his-

tory of 18 USCA § 241 (formerly 18 USCA § 51, Rev. Statutes § 5508). Similarly in the brief of appellants, as well as in those of the several organizations appearing amici curiae, that statute is lugged in as representing the "criminal counterpart" of the statute under inquiry. The section is quoted on the margin.[5] Its validity has been upheld by the Supreme Court and its provisions several times applied to private conspiracies. The cases applying it will be reviewed shortly. For the moment I desire to call attention to the fact that the statute is not at all a counterpart of the one here invoked. In fitting language it describes a conspiracy which private individuals are perfectly capable of conceiving and effecting, namely, a conspiracy to "injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised

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[5] "§241. Conspiracy against rights of citizens.

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

This statute derives from the Act of May 31, 1870, 16 Stat. 141.

the same."[6] This verbiage may conceivably be regarded as descriptive of what the appellees in this case appear actually to have done and conspired to do, but since the statute provides no civil remedy in damages it necessarily affords no ground for federal jurisdiction here.

The cases in which § 241, supra, was applied reveal the Court's deep preoccupation with the necessity of the national government's protecting itself, its institutions, officers, and services from interference through individual misconduct. The first of the group, Ex Parte Yarbrough, 110 U. S. 651, involved a charge that the defendants had conspired to intimidate a citizen of African descent in the free exercise of his right to vote for a member of Congress, and in the execution of the conspiracy had beaten and wounded him. The Court said that it is the duty of the United States to see that the citizen may exercise this right freely, and to protect him from violence while so doing, or on account of so doing. "This duty," said the Court, "does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practised on its agents, and that the votes by which its members of Con-

[6]This statute should be compared with 18 USCA §242, relating to the "deprivation" of rights under color of state law or custom. The switch in congressional verbiage when dealing with state action is of obvious significance.

gress and its President are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice." The same insistent note of concern for the integrity of the functions and processes of the national government runs through all the cases arising under that section.[7]

While the problem had better be left to be dealt with when it is presented, I may for present purposes assume that the criminal statute on which all but one of the foregoing cases proceed, namely

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[7] In In re Quarles and Butler, 158 U. S. 532, the charge was that the defendants conspired to injure and oppress one Worley for having reported to a United States deputy marshal that certain individuals had violated the internal revenue laws by carrying on illicitly the business of a distiller. In Logan v. United States, 144 U. S. 263, the conspiracy charged was to do violence to certain individuals while in the custody of a United States deputy marshal, who was holding them to answer for a federal offense. United States v. Waddell, 112 U. S. 76, involved the right of a citizen to be protected against enforced removal by others from public land on which he had made a homestead entry, where it was requisite that he continue his residence to perfect his entry. Crandall v. Nevada, 73 U. S. 35, although decided prior to the adoption of these statutes, proceeds on the same strain. It had to do with a state law exacting a tax on all persons entering or leaving the state. The statute was held invalid on the broad ground of the right and necessity of the people being left free to travel to the seat of the national government, to the seaports, and to the land offices and other agencies of the United States distributed widely throughout the country.

§ 241, supra, would reach a conspiracy having substantially the object of interfering with the exercise of the right of citizens to assemble for the purpose of discussing national affairs or of petitioning Congress for the redress of grievances.[8] There is dicta in United States v. Cruikshank, 92 U. S. 542, supporting that view, although the actual holding was that no offense under the statute was discernible in the indictment, which charged that the defendants conspired to hinder named citizens of the United States (negroes) in the free exercise and enjoyment of their "lawful right and privilege to peaceably assemble . . . for a peaceful and lawful purpose." The right of the people to assemble for any lawful purpose was thought to be an attribute of the citizens of any free government and did not derive from the federal constitution. For their protection in its enjoyment, therefore, it was said that the people must look to the states.

I return now to the case immediately before us, The majority opinion gives to the instant statute no more than cursory attention, quoting it at the outset in a footnote but thereafter ignoring its distinctive wording. The clause descriptive of the conspiracy is treated as though it said something widely different from what it does say or means something other than it says. The conspiracy alleged is referred to as one to "interfere with" or

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[8] Cf., however, Screws v. United States, 325 U. S. 91; Williams v. United States, 5 Cir., 179 F. 2d 644.

"break up" a meeting being held for the purpose of discussing and petitioning Congress in respect to the Marshall Plan; and the question presented is discussed as though the conspiracy clause were couched in language substantially identical with the clause found in 18 USCA § 241, supra. The primary effort of the majority is devoted to proving their point that Congress, although purportedly legislating in support of the Fourteenth Amendment, was aiming at private rather than state action—a proposition with which I am not at all in disagreement. But their absorption in that effort has led them, I think, to overlook the circumstance that Congress succeeded only in providing redress for conduct of which individuals are in the nature of things incapable except when acting under color of state authority. Thus by a species of unconscious judicial legislation they have rewritten the clause to make it conform to what they believe to have been the legislative intent.

In the infinite multiplicity of public meetings held in this country nowadays there are few that fail to concern themselves in one way or another with national affairs. If the loosely casual interpretation the majority have given this special statute is to prevail, the federal government through its courts will from now on be under the necessity of policing political meetings throughout the whole of the forty-eight states. There are many and various ways of interfering with and interrupting such meetings when, as has frequently happened in the

course of our history, individuals of violently opposed opinion really set their minds to it. A little clique in the gallery, for example, may be concerted jeers and catcalls, the heckling of speakers, or the making of loud and unseemly noises, disrupt partisan gatherings as effectively as can be done by direct action. And the picketing of public assemblages, now so freely practised, is a calculated and often effective means of frightening the timid into remaining away altogether.

It seems to me therefore that my brothers, although protesting the contrary, have by their undiscriminating appraisal of this long dormant act opened wide the gates to federal intervention in a field heretofore thought solely within the competence of the states. For my part, out of respect at least for our dual system, which the federal courts have traditionally been vigilant to preserve, I would postpone the intervention until such time as Congress has by clear and fitting legislation made that course unavoidable. Meantime I would not, by federal exertion of a dubious power, weaken or discourage the local sense of responsibility for the policing and protection of public assemblages.

I need not review the allegations of the pleading thought insufficient below to confer federal jurisdiction. That task has already been performed by the trial judge. In his analysis of the factual aspects of the complaint he has revealed this case to be the transparent sham it is when read against the actual wording of the statute. Here, as his discussion

shows, a sporadic incident of transient interference with the exercise of a right is by the ingenuity of counsel dressed up in grave constitutional attire and pointed to as a "deprivation" of the right.

Judges are apt to be naive men, as Justice Holmes is reported as remarking, but they are not, I hope, so ingenuous as to be oblivious of the world about them. This incident occurred in La Crescenta, a sizeable suburb of the City of Los Angeles. One hardly need say that the Los Angeles community is justly celebrated for its tolerance of all sorts and conditions of people and ideas. The hospitality of the community embraces not merely the conformist, the respectable and the truly good, but the prodonents of practically every ism under the sun. Presumably, and so far as appears from appellants' pleading, La Crescenta has a police force able and willing to protect peaceful assemblies of all comers from intrusion or violence. The club whose members are complaining of the disruption of their meeting had but to call on the police to eject this handful of intruders, and if a repetition of the intrusion were anticipated at future meetings they need only have asked the local authorities for protection from it. No substantial deprival by private action of the right of assembly and petition is possible in such an atmosphere, no matter whose lexicon is taken as the standard. Moreover the laws of the State of California provide means of redress, civil and criminal, for whatever wrongs were done in this instance. If for no more compelling reason,

the dismissal of the case was justified for lack of a substantial federal question.

The judgment should be affirmed.

[Endorsed]: Opinion and Dissenting Opinion. Filed May 29, 1950.

PAUL P. O'BRIEN,
Clerk.

United States Court of Appeals for the Ninth Circuit

No. 12120

HUGH HARDYMAN, et al.,

Appellants,

vs.

ORVILLE COLLINS, et al.,

Appellees.

Appeal from the United States District Court for the Southern District of California, Central Division.

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of dismissal of the said District Court in this Cause be, and hereby is reversed.

Filed and entered May 29, 1950.

PAUL P. O'BRIEN,
Clerk.

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety (90) pages, numbered from and including 1 to and including 90, to be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellees, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 6th day of July, 1950.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 217

ORDER ALLOWING CERTIORARI—Filed October 9, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1330)

IN THE

Supreme Court of the United States

October Term 1949

No. 217

ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD, JAMES E. DOGGETT and RALPH BAKER,

Petitioners,

vs.

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS and MRS. MABLE PRICE,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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vs.

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS and MRS. MABLE PRICE,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioners pray that a writ of certiorari issue to reverse the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 29, 1950, reversing the judgment of the United States District Court for the Southern District of California.*

*References to the printed record will be thus: [R. 20], *e.g.*, page 20 of the printed record.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered May 29, 1950 [R. 61. The issues as to which the petitioners seek this Court's review involve the construction of Section 47(3) to Title 8, U. S. C. A., sometimes referred to as the Civil Rights Act. It is the position of the petitioners that the amended complaint does not set a cause of action within the jurisdiction of the Federal Courts. This issue was decided favorably to the petitioners in the lower court [R. 18] but was decided adversely to the petitioners in the U. S. Court of Appeals in a split decision [R. 61, 75].

The jurisdiction of this court is invoked under 28 U. S. C. 1254(1) and 2101(c). The relevant portions of Section 47(3) of Title 8 U. S. C. A., the statute involved, reads as follows:

> "If two or more persons in any State or Territory conspire * * *, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged herein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Questions Presented.

It is the position of the petitioners that the foregoing statute did not have the effect of taking into Federal control the protection of private rights against invasion by private individuals and, therefore, that the Federal Courts have no jurisdiction under the cause of action set forth in the respondents' amended complaint.

The petitioners' motion to dismiss was granted by the lower court and this decision was reversed by the United States Court of Appeals which held that the amended complaint did set a cause of action within the cognizance of the Federal Courts. The correctness of the ruling of the latter court as to the jurisdiction of the Federal Courts is the subject of this petition.

Statement of the Case.

The facts are set forth in the amended complaint [R. 2]: The amended complaint, in substance, alleged that appellants are citizens of the United States and are members of the Crescenta-Canada Democratic Club. Appellant Morse is chairman of the club and appellant Hardyman is chairman of the club and appellant Hardyman is chairman of the program and publicity committee.

The Crescenta-Canada Democratic Club, hereinafter called the club, is a voluntary association, duly organized and chartered by the Los Angeles County Democratic Central Committee and recognized officially as a Democratic club. Its claimed purposes were to participate in the election of officials of the United States, including the

President, Vice-President and members of Congress; to petition the National Government for redress of grievances; to engage in public meetings for the discussion of national public issues, including the international and foreign policies of the United States.

Pursuant to a customary practice the club held regular public meetings in the City of La Crescenta at which affairs of national interest and importance were discussed and such action taken thereon as the members deemed advisable. The club arranged for and scheduled a public meeting in the city of La Crescenta for the evening of November 14, 1947, at which a named speaker was to discuss the foreign policy of the United States, including the Marshall plan. The discussion was to be participated in by the members of the club and others attending the meeting. It was also understood, that at said meeting a resolution would be presented opposing the Marshall plan with the understanding that such a resolution, if passed, would be forwarded to the President of the United States, the State Department and members of Congress. Said resolution was intended to be a petition for redress of grievances with respect to the Marshall plan. At previous meetings similar resolutions had been adopted and forwarded to officials of the Government.

Appellees, having knowledge that a meeting of the club was to be held November 14, and also being informed of the program and purposes of said meeting, entered into a conspiracy to break up said meeting and to prevent the adoption and transmission of the proposed resolution. In

furtherance of such conspiracy appellees went to the building in which the meeting was being held, threatened to and did assault appellants, ordered those attending the meeting to leave and thus forced those in attendance to disperse and by threats and violence prevented those attending the meeting from adopting and transmitting the proposed resolution. Appellees had not conspired or interfered with public meetings held with the knowledge of appellees by organizations expressing views with which appellees agreed and at which resolutions were adopted respecting the foreign policies of the United States.

The trial court held that Section 47(3) of Title 8 U. S. C. A. does not sanction a cause of action against private individuals who interfere with the privilege of assembling to petition Congress and to discuss national affairs unless the interference is committed by the State or a person acting in authority thereof. The majority opinion of the court of Appeals held that this statute would create a cause of action for money damages against private individuals who interfere with a plaintiff in the exercise of his Federal rights, triable in the federal courts.

Reasons for Granting the Writ.

1. It is necessary that this court grant a writ of certiorari in order to secure uniformity of decisions. At the present time there is an irreconcilable conflict in the decisions on this matter in the United States Courts of Appeals. Until the decision in question, the only cases that had decided the matter held that Section 47(3) gave Federal protection only against State action. *Love v. Chandler* (8 Cir. 1942), 124 F. 2d 785; *Viles v. Symes* (10 Cir. 1942), 129 F. 2d 828. The instant case is contrary to these decisions and holds that the statute confers Federal jurisdiction protection against the acts of private individuals.

2. The decision of the court of Appeals in the case before the bar is one of unparalleled gravity and importance in its potential effect on the volume of litigation to be handled by the Federal courts. If it is allowed to stand, it is probable that the Federal courts will be flooded by an unprecedented number of cases concerning matters which have heretofore been considered as within the exclusive province of State courts. By virtue of this decision, every person in the United States, who fancies that his right to discuss any Federal question has been infringed upon by his neighbor, would be entitled to come into the Federal courts and seek money damages. Trespass, assault and battery, and other similar complaints will occupy a substantial portion of the court's time without the limiting factor of the diversity of citizenship required to minimize the volume of such actions. If the Federal courts are going to resurrect a statute almost a century old and give it a new twist, which will open a whole new phase of litigation to the Federal courts, at the very least, this rebirth should be attested to by this court.

Argument.

The argument that the petitioners would urge this court to consider is ably set forth in Judge Healy's carefully reasoned dissenting opinion [R. 75] and in the carefully annotated decision of Judge Yankwich, the trial judge, who granted petitioner's original motion to dismiss [R. 18]. It would serve no useful purpose to reword or rephrase these opinions.

However, a few brief observation seem in order. First of all, paradoxically enough, the majority opinion is based upon a decision which declared unconstitutional a statute somewhat broader than the one before this court. *United States v. Harris,* 106 U. S. 629, and the extraneous *dicta* contained in that case are indeed faint authority for the conclusion reached by the majority of the court. There is no doubt that Section 47(3) in its original enactment was passed by Congress at a time when it thought that it could legislate to protect civil rights from individual action. Indeed the Act was entitled "An Act To Enforce the 14th Amendment". Commencing with the *Civil Rights Case,* 109 U. S. 3, this court has consistently held that Congress was in error in its conception of its powers under the 14th Amendment. It would seem that, rather than give an unprecedented interpretation to a long dormant statute, the judiciary should await a clear expression from the Legislature before discovering an entirely new body of law and actions over which the Federal Courts have jurisdiction.

It should also be borne in mind that, while the language of the criminal statute is similar to the statute in issue, it is fundamentally different. That is to say, 18 U. S. C. A., Section 241 reads in part, "If two or more persons conspire to injure, oppress, threaten or intimidate any citizen

in the free exercise or engagement of *any* right or privilege secured to him by the Constitution of the Laws of the United States . . ." As pointed out in Judge Healy's dissent, the crucial language of 47(3) "for the purpose of *depriving,* either directly or indirectly, any *person* or *class* of persons of the *equal protection of the laws,* or of *equal privileges and immunities under the laws.*" [R. 77]. The difference in language is of fundamental importance as Judge Yankwich and Judge Healy pointed out, the inclusion of the word "equal" in Section 47(3) is of no little import. To rely on the cases which have construed the criminal statute is to ignore this important difference of language and meaning of the respective statutes. Furthermore, the majority opinion, which is not altogether clear in its meaning, is diametrically opposed in the case of *Love v. Chandler, supra.*

Conclusion.

The petitioner's Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1950.
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ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD, JAMES E. DOGGETT AND RALPH BAKER,

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Respondents.

MEMORANDUM IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI.

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While we believe that the decision of the Court of Appeals for the Ninth Circuit is clearly correct, we do not oppose the grant of the petition because it presents a question of construction of a Federal statute which has not been and should be settled by this Court in view of the conflict of the Circuits on this issue and its public importance.

Question Presented

The issue presented by the decisions of the Courts below and by the petition is whether the Federal civil rights legislation establishes a civil cause of action against private persons who, pursuant to a conspiracy, prevent by violence the continuance of an assembly of citizens called to discuss national affairs and to petition Federal officials for a redress of grievances.

The section of the civil rights legislation here involved reads:

§47. Conspiracy to Interfere With Civil Rights.

* * * * * * * *

Depriving Persons of Rights or Privileges.

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal portection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act

in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

[8 U. S. C. 47(3), derived from Act of April 20, 1871, c. 22, sec. 2, 17 Stat. 13, hereinafter referred to as section 47(3).]

Statement of the Case.

Proceedings—On the basis of respondents' complaint praying for damages under section 47(3) and petitioners' motion to dismiss the complaint for failure to state a cause of action, the District Court granted petitioners' motion [R. 49-50].

The facts set forth in the complaint are stated in the Petition. In sum, the complaint alleged that the respondents, citizens of the United States, were officers of a local Club of the Democratic Party which had scheduled for one of its regular public meetings a discussion of the Marshall Plan and consideration of the adoption of a resolution in regard to it for forwarding to the President of the United States, the State Department and members of Congress [R. 2-5]. Because of their opposition to respondents' views, petitioners, pursuant to a conspiracy, broke up the meeting, and prevented the adoption and transmission of the proposed resolution by threatening and assaulting the respondents and other participants [R. 5-8]; petitioners did not, however, interfere with public discussions and the adoption of resolutions respecting the

foreign policies of the United States, by organizations expressing views with which they agreed [R. 6].

Decision of the District Court—The District Court held that the complaint failed to state a cause of action, on the basis that section 47(3) does not establish a cause of action for acts of interference with Federal privileges unless committed by virtue of power granted by the State [R. 34.] The Court took cognizance of the principle that Congress has power under the original Constitution absent the amendments to protect the privilege of assembling to petition the Federal Government and discuss national affairs, against interference by private persons [R. 20-22, 23-24]; his holding that the power was not exercised in section 47(3) was based largely on the civil rights decisions of this Court which have arisen under the Thirteenth, Fourteenth and Fifteenth Amendments and have held that Congress is empowered to protect the rights assured thereunder only against State action [R. 22, 24-26, 34-39]. The District Court also relied on the decision of the Eighth Circuit in *Love v. Chandler*[1] [R. 22-23, 34-35] and on some of the phraseology of section 47(3) [R. 24-26].

Decision of the Circuit Court of Appeals—The Court of Appeals, in a two to one decision, reversed the District Court, holding that section 47(3) applied to the acts of private persons. The Circuit Court pointed to the fact that any other construction would deprive the various provisions of the section of reasonable meaning [R. 65-66], and to this Court's similar construction of a statute with identical language [R. 66].[2] The legislative history of

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[1]124 F. 2d 785 (1942).

[2]In *United States v. Harris*, 106 U. S. 629.

47(3), on which the Circuit Court relied as additional evidence of the Congressional intent, showed that though the statute was enacted with the intent of enforcing the Fourteenth Amendment, Congress believed the Amendment gave it power to act against private persons [R. 66-68]. The reference in 47(3) to the denial of "equal" privileges and immunities, on which the District Court had relied, was intended in a sense entirely consistent with the purpose of establishing a cause of action against private persons [R. 68].

As to the constitutional power of Congress to enact 47(3) in its intended scope, the Court pointed out that while the Constitution guarantees for the most part apply only to State action, this Court has repeatedly upheld the power of Congress to protect a narrow set of rights against infringement by private individuals [R. 69-70]. And the Circuit Court held, on the basis of this Court's repeated assertions in dictum dating from 1876, "that the rights to assemble for the purpose of discussing the policies of the Federal Government and petitioning that Government for redress of grievances" [R. 71], which are "the rights alleged to have been violated in the instant case," "are within that narrow area of rights which Congress has constitutional power to protect from individual invasions" [R. 72].

Finally, the Court concluded that the Congressional power to accord protection against acts of private persons had been validly expressed in section 47(3), distinguishing this Court's decisions in *United States v. Harris*,[3] and *Baldwin v. Franks*.[4] In the latter decision, this Court

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[3] *Ibid.*

[4] 120 U. S. 678.

reiterated the *Harris* holding that a prior statute with a coverage somewhat similar to 47(3) was unconstitutional in that it applied to the deprivation of rights under State laws as well as of Federal rights, and further ruled that the State and Federal phases of that statute were inseperable. The Circuit Court held that the coverage by 47(3) of deprivations of Federal rights was separable on the basis of the provision, which had not appeared in the prior statute, respecting acts in furtherance of the conspiracy [R. 74-75]. The Court doubted the merit of the contention that its construction of 47(3) would result in a flooding of the Federal Courts, and stated that in any event this possibility could not influence its decision [R. 72, 75].

Dissenting Opinion—Judge Healy, dissenting, voiced his "general agreement" with the District Court's opinion [R. 75]. Further, while agreeing that Congress had intended to legislate in section 47(3) against the acts of private persons, he was of the opinion "that Congress succeeded only in providing redress for conduct of which individuals are in the nature of things incapable except when acting under color of state authority" [R. 86]. Relying on this Court's opinions, the dissenting judge maintained that while private individuals might interfere with the exercise of equal rights and privileges, such interference could not be deemed a denial or deprivation of the right unless the individual's interference was in some way sanctioned by the State [R. 78-81]. He deplored the majority's construction of 47(3) as opening "wide the gates to federal intervention in a field heretofore thought solely within the competence of the states" [R. 87], and as placing "the federal government under the necessity of policing political meetings throughout the whole of the forty-eight states" [R. 86].

Reasons for Granting Writ.

While we believe the Circuit Court's decision is clearly correct, we submit that this Court, which has not heretofore been presented with the instant issue of statutory construction, should determine it. In the first place, there is a clear conflict between the decision in the instant case and a decision of the Court of Appeals for the Eighth Circuit, which requires settlement by this Court. Further, the implementation of 47(3) by the Circuit Court's construction is of outstanding significance in the operation of the Federal civil rights legislation, and in the maintenance of basic Constitutional rights; thus, we believe that even aside from the conflict in the decisions, this construction should be asseverated and established by the judgment of this Court as the law of the land. And that the issue is one deserving, from the standpoint of its difficulty, of this Court's consideration is indicated not only by the conflicting decisions, but also by the dissent in the instant case, and the fact that the trial court's decision to the contrary of the Circuit Courts was supported by a careful and scholarly opinion; in addition, it is to be noted that the Circuit Court found it necessary in order to arrive at its conclusion to distinguish two of this Court's decisions. Finally, as pointed out by petitioners, the instant decision is of peculiar significance since it appears to be the first since the passage of the statute in 1871 in which a complaint based solely upon section 47(3) has been held valid.

1. *Conflict Between Circuits*—As pointed out in the Petition, the instant decision of the Ninth Circuit is in clear and direct conflict with the decision of the Eighth Circuit in *Love v. Chandler*.[5] In that case it was ruled

[5]Cited *supra*, note 1; followed in the Eighth Circuit in *Moffett v. Commerce Trust Co.*, 75 Fed. Supp. 303, 306 (W. D. Mo., 1947).

that a complaint for damages on the basis of acts perfomed by persons in their private capacities, pursuant to a conspiracy, to deprive the plaintiff of his rights under the Federal WPA law, failed to state a cause of action under section 47(3) and the preceding subsection of section 47. The Court squarely based its holding on a construction of section 47 contrary to the instant one; it held that the section did not apply to acts by "persons, as individuals," (124 F. 2d at p. 787) and, was only "intended to provide for redress against State action" (124 F. 2d at p. 786). The Circuit Court in the instant opinion pointed out that it regarded its decision as in conflict with *Love v. Chandler* [R. 69] on which the District Court had heavily relied [R. 22-23, 34-35].

While there do not appear to be any other definitive holdings on the question here at issue, the Court of Appeals for the District of Columbia has indicated agreement with the instant holding.[6] On the other hand, several courts have stated that section 47 does not apply to the acts of private persons,[7] and the *Chandler* opinion has been cited with approval in several opinions.[8]

2. *Public Importance of Question at Issue and of its Determination by this Court*—This Court's affirmance of the ruling that 47(3) establishes a civil cause of action against private persons, is the last step necessary to complete the validation of the various forms of remedy pro-

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[6] *Laughlin v. Rosenman*, 163 F. 2d 838, 843 (1947).

[7] See *Viles v. Symes*, 129 F. 2d 828, 831 (C. A. 10, 1942); *Bottone v. Lindsley*, 170 F. 2d 705, 706 (C. A. 10, 1948); *Bomar v. Bogart*, 159 F. 2d 338, 339 (C. A. 2, 1947); *Allen v. Corsano*, 56 Fed. Supp. 169, 171-173 (D. Del., 1944).

[8] See *Bottone, Bomar*, and *Allen cases*, loc. cit. *supra*, note 7.

vided by the Federal civil rights legislation; for the other three procedures for the maintenance of Federal rights,—the criminal[9] and civil[10] actions against persons clothed with State authority, and the criminal action against private persons,[11]—have already been upheld by this Court. And, as this Court has pointed out,[12] it is of special importance to implement the sections of the civil rights acts now extant, because Congress has preserved them for more than half a century, despite its repeal of numerous other sections of the original civil rights legislation; similarly, the precedents of this Court which support the Circuit Court's construction of 47(3), particularly warrant effectuation because of their time-honored and unchallengeable status.

The fact that the rights implemented by the proper construction of 47(3), as rendered by the Circuit Court, are among the most significant in our political system, further augments the importance of its affirmation by this Court as the law of the land. The very test of whether a right is a Federal privilege or immunity protected by section 47(3) is whether it is in the small class of those which are "essential to the healthy organization of the Government itself."[13] And the significance of the particular right here involved,—to assemble to discuss national issues and petition the Federal government,—lies in the truth, epitomized by the Circuit Court on the basis of numerous opinions of this Court, that "a representative government

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[9]*Screws v. United States*, 325 U. S. 91.

[10]*e. g. Hague v. C. I. O.*, 307 U. S. 496.

[11]*e. g. Ex parte Yarbrough*, 110 U. S. 651.

[12]*Screws v. U. S.* 325 U. S. at p. 100.

[13]*Ex parte Yarbrough*, 110 U. S. at p. 666.

cannot function properly unless its officers are informed of the opinions and desires of the people whom they represent" [R. 72-73].

As recognized by Congress in providing for the criminal action against private individuals already upheld by this Court and the civil action against them here in issue, a remedy against mob action by private individuals is as important as a remedy against acts under color of State law in preserving the right of the people, particularly of unpopular minorities, to speak on Federal affairs as well as their other Federal rights.[14] Further, the civil cause of action may have more significance than the criminal in the maintenance of these rights. For, besides the prosecutor's necessary selectivity, official reluctance to prosecute may well coincide with mob hostility to Federal rights; and a jury may be willing to render a civil verdict for the infringement of political rights, while viewing such rights with insufficient concern to impose a criminal penalty.[15]

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[14]Thus, District Judge Yankwich, though dismissing the complaint, stated:

> "We grant that the acts complained of * * * inflicted a grievous wrong on the plaintiffs. Such acts are manifestations of that ignoble mob spirit which is so abhorrent to a free, decent and democratic society * * *. They would enthrone the mob as arbiter of freedom. And I know of no more unsafe and unforthy repository of the rights of the individual". [R. 40].

And see the statement by Mr. Justice Clark, penned while Attorney General:

> "Our democracy suffers a grievous, if not fatal, blow when the processes of law and order are broken down by mob violence."

Clark, *A Federal Prosecutor looks at the Civil Rights Statute*, 47 Col. Law Rev. 175, 185 (1947).

[15]See Carr, *Federal Protection of Civil Rights* (1947), pp. 14, 60, 148-9; *"To Secure These Rights,"* Report of President's Committee on Civil Rights (1947), pp. 117-118.

Thus, the certainty by virtue of 47(3) that redress can be sought for a violation of Federal rights, regardless of whether, because of its political significance or for other reasons prosecution is instituted, will serve as an important deterrent to violations, and as a safeguard of the universal security of the rights essential to a representative government.

The chance that the State police will prevent infringement, as suggested by Judge Healy [R. 88], or that the conduct infringing Federal rights will give rise to a State cause of action,—which is a possibility in the case of all the other sections of the civil rights legislation as well as 47(3),—does not nullify the importance of 47(3). It is only an action specifically directed at the protection of the Federal right, with the gravity of the conduct and of the resultant damages measured in terms of its invasion, which will vindicate and assert the plaintiff's Federal rights and, in view of the national scope of the cause of action, serve as a nationwide deterrent to their violation.

For all these reasons, we believe that the question on which the Court of Appeals for the Ninth Circuit differs in the instant decision from the Eighth Circuit is one of serious significance, and that it is of substantial public importance[16] that the correct construction of section 47(3),

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[16]In the court below, the National Association for the Advancement of Colored People, the American Jewish Congress and the Congress of Industrial Organizations filed briefs *amicus curiae* urging the construction which the court adopted. In view of Rule 27(b) of this court no briefs *amicus* have been filed at this time, but it is expected that if certiorari is granted, appropriate steps will be taken by these and perhaps other organizations looking to the filing of such briefs.

as set forth in the Circuit Court's decision, be established as the law of the land. We therefore submit that this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this.....day of September, A. D. 1950.

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9-7-50—55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 217

ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD, JAMES E. DOGGETT and RALPH BAKER,
Petitioners,

vs.

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS and MRS. MABLE PRICE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

CASES CITED

LAWS

MISCELLANEOUS AUTHORITIES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

Opinions Below

The opinion of the Court of Appeals for the Ninth Circuit is reported at 183 F. (2d) 308. The opinion of the District Court for the Southern District of California, Central Division, is reported at 80 Fed. Supp. 501.

Jurisdiction

This Court, acting pursuant to Section 1254(1) of the Judicial Code of 1948 [28 U. S. C. 1254(1)], granted petitioners' petition for certiorari to the Court of Appeals for the Ninth Circuit, on October 9, 1950. That Court had entered judgment on May 29, 1950 (R. 90), reversing the District Court's grant of a motion to dismiss respondents' complaint (R. 49-50), and holding that the complaint stated a cause of action under Section 47(3) of Title 8 of the United States Code (derived from Act of April 20, 1871, c. 22, sec. 2, 17 Stat. 13).

Statement of the Case

Statute to be construed (with italicization of portion directly involved in the case at bar):

§ 47. Conspiracy to Interfere with Civil Rights.

* * * * *

Depriving Persons of Rights or Privileges.

(3) *If two or more persons in any State* or Territory *conspire* or go in disguise on the highway or on the premises of another, *for the purpose of depriving, either directly or indirectly, any person or class of persons* of the equal protection of the laws, or *of equal privileges and immunities under the laws;* or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for

President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; *in any case of conspiracy set forth in this section, if one or more persons engaged therein do,* or cause to be done, *any act in furtherance of the object of such conspiracy, whereby another is* injured in his person or property, or *deprived of having and exercising any right or privilege of a citizen of the United States, the party so* injured or *deprived may have an action for the recovery of damages occasioned by such* injury or *deprivation, against any one or more of the conspirators.*

[8 U. S. C. 47(3), derived from Act of April 20, 1871, c. 22, sec. 2,17 Stat. 13; hereinafter referred to as section 47(3).]

Proceedings—On the basis of respondents' complaint praying for damages under Section 47(3) and petitioners' motion to dismiss the complaint for failure to state a cause of action, the District Court granted petitioners' motion (R. 49-50). On appeal by respondents, the Court of Appeals reversed the judgment of dismissal (R. 90).

Facts—The facts set forth in the complaint are stated in the petition for a writ of certiorari. In sum, the complaint alleged that the respondents, citizens of the United States, were officers of a local Club of the Democratic Party which had scheduled for one of its regular public meetings a discussion of the Marshall Plan and consideration of the adoption of a resolution in regard to it for forwarding to the President of the United States, the State Department and members of Congress (R. 2-5). Because of their opposition to respondents' views, petitioners, pursuant to a conspiracy, broke up the meeting, and prevented the adoption and transmission of the proposed resolution, by physically threatening and forcibly assault-

ing the respondents and other participants (R. 5-8); petitioners did not, however, interfere with public meetings, including the adoption of resolutions, respecting the foreign policies of the United States, which had been held with petitioners' knowledge by citizens expressing views with which petitioners agreed (R. 6).

Decision of the District Court—The District Court held that the complaint failed to state a cause of action, on the basis that section 47(3) does not establish a cause of action for acts of interference with Federal privileges unless committed by virtue of authority granted by a State (R. 34). While the Court took cognizance of the principle that Congress has power under the original Constitution, absent the Amendments, to protect as against private persons the privilege of assembling to petition the Federal Government and discuss national affairs (R. 20-22, 23-24), it appeared to ignore this principle in its construction of 47(3). Its holding that this conceded power under the original Constitution was not exercised in section 47(3), was based largely on the civil rights decisions of this Court which have arisen under the Thirteenth, Fourteenth and Fifteenth Amendments and have held that Congress is empowered to protect the broad categories of rights assured thereunder only against State action (R. 22, 24-26, 34-39). The District Court also relied on some of the wording of section 47(3) (R. 24-26).

Decision of the Court of Appeals—The Court of Appeals, reversing the District Court with one judge dissenting, held that the instant complaint was authorized by section 47(3) because the section applies to an attack by any person, regardless of his possession of State authority, on a right within the narrow category constituting essentially Federal privileges. The Court pointed to re-

peated and unmistakable evidence from the legislative history of Congressional intention for section 47(3) to apply to such acts as those here in issue (R. 66-68). The Court also pointed to the fact that construction of the section as applicable to private individuals was the only one which would lend its various provisions a reasonable meaning (R. 65-66), and to this Court's similar construction of identical language in another statute (R. 66).[1]

As to the constitutional power of Congress to enact 47(3) in its intended scope, the Court pointed out that while the Amendments for the most part apply only to State action, this Court has repeatedly upheld the power of Congress under the original Constitution to protect a narrow set of rights against infringement by private individuals (R. 69-70). And the Circuit Court held, on the basis of this Court's repeated assertions in dictum dating from 1876, "that the rights to assemble for the purpose of discussing the policies of the Federal Government and petitioning that Government for redress of grievances" (R. 71), which are "the rights alleged to have been violated in the instant case", "are within that narrow area of rights which Congress has constitutional power to protect from individual invasions" (R. 72).

While the Court assumed, on the basis of decisions of this Court under another statute, that the provision of 47(3) respecting a deprivation of "equal protection" was invalid, it held that only the provisions respecting "privileges and immunities" and "the right or privilege of a citizen of the United States" are here involved and are separable from the invalid phase (R. 74-75). Finally, the Court pointed out that its construction of 47(3) as authorizing the complaint at bar would not result in an

[1] In *United States* v. *Harris*, 106 U. S. 629.

undue burden of Federal litigation, because of the limited range of the essentially Federal rights to which 47(3) would be applicable under its construction (R. 72, 75).

Question Presented

The issue presented is whether the Court of Appeals was correct in holding that section 47(3) was intended to establish, and validly does establish, a civil cause of action against private persons who, pursuant to a conspiracy, use violence to prevent citizens from assembling to discuss national affairs and to petition Federal officials for the redress of grievances.

Summary of Argument

I

The decisions of this Court clearly establish that Congress had constitutional power to establish by section 47(3) a right of action on the basis of the acts alleged in the instant complaint. For, under the original Constitution, absent the amendments, Congress unquestionably has the power to protect as against private individuals as well as the States the small category of rights essential to the functioning of the Federal Government; and this category includes the right to assemble to discuss national affairs and to petition the Federal Government, which is the right alleged to have been violated in the instant action. The validity of the instant cause of action under section 47(3) thus does not depend on any of the Constitutional Amendments, and the question of whether the latter apply to individual as well as State action is irrelevant.

II

A. Both the language and the legislative history of section 47(3) show that it was intended to authorize the instant cause of action. The context of the words "two or more persons", to whom the section is in terms applicable indicates that they must be given their literal meaning; and the legislative history demonstrates beyond question that the section was intended to apply to private individuals. Furthermore, related statutes with identical language in relevant part have been repeatedly construed by this Court to apply to private individuals.

The legislative history further shows beyond doubt that the provisions respecting "privileges and immunities under the laws" and "any right or privilege of a citizen of the United States" in section 47(3), which are the provisions on which the instant complaint is based, were intended to cover the rights assured by the Federal Government directly to citizens of the United States by implication from the original Constitution; these rights include the right here involved of assembling to discuss national affairs and to petition Federal officials.

B. Since the instant cause of action is based upon and is authorized by the privileges and immunities provision of section 47(3), it is inappropriate in this case to consider the possible invalidity of the provision respecting "equal protection of the laws". But, assuming *arguendo* that the latter question should be determined herein, the equal protection provision is valid and constitutional if construed in accordance with the legislative intent. For it is clear from the legislative history that Congress did not thereby intend to refer to the protection of State laws, which would concededly raise a difficult Constitutional problem. Rather, "equal protection of the laws" was intended, with "equal privileges or immunities under the

laws" to refer to the rights granted to individuals as citizens under the original Constitution and the rights granted to them by Federal statute, with "equal protection" regarded as emphasizing Federal statutory, rather than Constitutional, rights.

C. Assuming *arguendo*, however, that the "equal protection of the laws" provision refers to State laws and is invalid, its invalidity does not affect the portion of section 47(3) invoked in the instant complaint. The underlying and dominant intent of Congress was to protect by section 47(3) whatever rights of the citizen it was empowered by the Constitution to protect as against private individuals, and it undoubtedly would have enacted section 47(3) even if it had known that the right to the equal protection of State laws was not within its protective power. Thus, under the established criterion of separability, of whether the statute would have been enacted even if Congress had realized the necessity for deleting the invalid portion, the valid portions of section 47(3) here involved are clearly separable from the equal protection provision.

D. The chance that the aid of the State police might be secured to prevent the deprivations of Federal rights at which 47(3) is aimed, or that the conduct causing the deprivation might give rise to a State cause of action, does not negate the significance of section 47(3). It is only an action specifically directed at the protection of Federal rights, with the gravity of the conduct and of the resultant damages measured by the extent of their invasion, which can vindicate the Federal rights, redress their deprivation, and serve as a nation-wide deterrent to their violation. While protection of essentially Federal rights, such as those here involved, through Federal action is necessary, their number is so small that construc-

tion of section 47(3) as authorizing the instant cause of action is unlikely to result in an excessive amount of Federal litigation.

ARGUMENT

I. Section 47(3), construed to authorize the instant complaint, is constitutional. Congress is empowered by the Constitution to protect, as against the acts of private individuals, the right of citizens to assemble peaceably to discuss national affairs and to petition federal officials.

As the Circuit Court held, it was unquestionably within the Constitutional power of Congress to provide by section 47(3) for a right of action on the basis of the acts alleged in the instant complaint.

That there is a small category of rights assured to the individual citizen by the Constitution, and that Congress has the power to protect such rights directly against the acts of private individuals as well as the States, has been incontrovertibly established by the decisions of this Court, largely in cases applying the criminal law parallel of section 47(3).[1] This power antedates, and does not depend upon, the Fourteenth Amendment; and the application of section 47(3) to attacks by private individuals on rights of this category therefore does not involve the question of whether the Amendments only apply to State action.[2] For these essentially Federal rights do "not depend upon any of the Amendments to the Constitution but arise(s)

[1] 18 U. S. C. 241 (derived from Act of May 31, 1870, Sec. 6, 16 Stat. 140); discussed *infra*, pp. 16-17.

[2] Thus, in one of the opinions upholding an application of the criminal law parallel, this Court said: "Reference to cases under * * * the Fourteenth Amendment * * * can afford no aid in the present case." (*Ex parte Yarbrough*, 110 U. S. 651, 665-6.)

out of the creation and establishment by the Constitution itself of a national government." [1] Those "rights * * * essential to the healthy organization of the government itself," [2] which are necessary to its "independence and supremacy",[3] are assured directly to the citizen by necessary implication from the original Constitution, as well as the correlative power and duty of Congress to protect them.[4]

This category of essentially Federal rights which are within the direct protective power of Congress, undoubtedly includes that which the complaint herein alleges to have been violated: to assemble peacefully to discuss Federal affairs and petition Federal officers.

In the words of this Court:

> "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the

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[1] *In re Quarles and Butler*, 158 U. S. 532, 535. Practically identical language also appears in *Logan* v. *United States*, 144 U. S. 263, 293.

[2] *Yarbrough*, 110 U. S. at 666.

[3] *Quarles*, 158 U. S. at 537; *Logan*, 144 U. S. at 293.

[4] See especially *Logan*, 144 U. S. at 293. The rights which have been held, by virtue of this principle, in decisions under 18 U. S. C. 241, to be subject to congressional protection as against private individuals, are: the right to vote in a Federal election (*Ex parte Yarbrough*, 110 U. S. 651, and see *United States* v. *Classic*, 313 U. S. 299, 315); the right to be free from mob violence while in Federal custody and to a speedy and public trial on a Federal charge (*Logan* v. *United States*, 144 U. S. 263); right to give information to authorities regarding violation of Federal laws (*In re Quarles & Butler*, 158 U. S. 532; *Motes* v. *United States*, 178 U. S. 458); right to apply to Federal court for process [*United States* v. *Lancaster*, 44 Fed. 885 (C. C., W. D., Ga. 1890)]; right to hold Federal office and perform its functions [*United States* v. *Patrick*, 54 Fed. 338 (C. C., M. D., Tenn. 1893)]; right to testify before Federal agencies, [*Foss* v. *United States*, 266 Fed. 881 (C. C. A. 9, 1920)].

> powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If * * * the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute [the criminal law parallel of 47(3)]." (*United States* v. *Cruikshank*, 92 U. S. 542, at p. 552.)
>
> *Semble*: *In re Quarles and Butler*, 158 U. S. 532, 535.[1]

The significance of Federal protection and implementation of this right was pointed out by the Court below when it said:

> "A representative government cannot function properly unless its officers are informed of the opinions and desires of the people whom they represent. To protect the right to assemble for the purposes alleged in this case is to keep open those vital channels of communication between government and the governed" (R. 73-74).

That Congress had the power to establish a cause of action on the basis of the facts stated in the instant complaint has not been controverted, and the only question at issue is whether this power was validly exercised in section 47(3).

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[1] See *Hague* v. *C.I.O.*, 307 U. S. 496, 512: "Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation * * *" (Opinion of Justices Roberts and Black, in which Chief Justice Hughes and Justice Stone concurred in this respect). And see *Powe* v. *United States*, 109 F. (2d) 147, 151 (C. C. A. 5th, 1947). In both the *Cruikshank* and *Powe* cases, the purpose of the assemblies there in issue was the discussion only of local affairs, and it was therefore held in both cases that no Federal right was involved.

II. Section 47(3) establishes a right of civil action against individuals who, in furtherance of a conspiracy, deprive citizens of their right to assemble peaceably to discuss national affairs and to petition federal officials. The complaint therefore states a cause of action under Section 47(3).

1. Section 47(3) applies to acts of private individuals, who do not possess State authority.

A. The Language of the Statute

The plain language of section 47(3) demonstrates, as the Circuit Court pointed out (R. 65-66), that its application is not restricted to acts of individuals possessed of State authority, and that the "persons" to whom the section is in terms applicable without limitation must be read in its literal sense.

The language of Section 2 of the Act of April 20, 1871, now incorporated in 47(3),—a civil action may be brought "if two or more persons in any State or Territory" commit specified acts—stands in clear contrast to the language of the section which directly preceded it in the 1871 Act.[1] The preceding section, now codified as 8 U. S. C. 43,[2] provided that a civil action may be brought against "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" inflicts deprivations of Federal rights. It is hardly conceivable that Congress shifted from the "under color of" language of section 43 to the "two or more persons" language of 47(3) with the intention, nevertheless, of carrying over the State authority limitation to the latter section.

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[1] Both sections are set forth in the Appendix, pp. 37-40.

[2] Set forth in Appendix, pp. 43-44.

Furthermore, the clause of section 47(3) under which the instant action is brought—"If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another for the purpose of depriving * * * any person * * * of equal privileges and immunities"—is directly followed by the clause "or for the purpose of preventing or hindering the constituted authorities of any State or Territory from" engaging in certain functions. It is wholly unreasonable to construe "persons" so that section 47(3) would establish a cause of action in the improbable circumstance that State authorities were hindered in their functions by other State agents, which would be the result if the term "persons" were limited to those possessing State authority. Finally, the coverage of "persons" in the event they "go in disguise on the highway or the premises of another" is obviously directed at any disguised individuals regardless of their possession of State authority. Thus, the context of the term "persons" in section 47(3) demonstrates that it was used in its customary and literal sense.[1]

B. Legislative History

It was the unanimous and unquestioned view of the draftsmen and sponsors of section 2 of the 1871 Act from which section 47(3) was derived, and in fact of all Congressmen who participated in the debates, that it applied

[1] As the Court stated in *United States* v. *Mosley*, 238 U. S. 383, 388, with respect to the parallel criminal section, there is no reason "to deprive citizens of the United States of the general protection which on its face [the] section * * * most reasonably affords." And see *Bomar* v. *Keyes*, 162 F. 2d 136 (C. A. 2nd, 1947), holding that the language of 8 U. S. C. 43 (the civil section relating to acts under color of State authority) must be applied in its usual and literal sense.

to the acts of private individuals, or, as one of its draftsmen said, to "any combination of men."[1] With increasing Ku Klux Klan activity as the background, the major topic of debate on the section was the constitutionality and justifiability of a sanction against private individuals; in reply to the charge of the opponents that the section would supersede State law with respect to the offenses of all private individuals,[2] spokesmen for the statute, at all times recognizing that it applied to private individuals, urged that it was concerned with their unlawful acts only insofar as Federal rights were affected thereby.[3]

The fact that the Act was entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Con-

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[1] Statement of Representative Cook, who offered the bill which became the Act of April 20, 1871, as a substitute for a previously introduced measure, Congressional Globe, 42nd Cong., 1st Sess. (1871), hereinafter termed Cong. Globe, p. 485.

The debates were mainly concerned with the portion of the section here in issue, which became the first clause of section 47(3), because most of the other parts of Section 2 were taken over from the Act of July 31, 1861, c. 33, 12 Stat. 284.

[2] Cong. Globe, pp. 337-8, 351-3, 357, 361, 366, 376-7, 385, 396, 416, 419, 420, 429-30, 455, Appendix, p. 215.

[3] Thus, in the words of Representative Shellabarger, Chairman of the House Committee which reported out the bill that became the Act of April 20, 1871: "Of course, Mr. Speaker, the constitutional objection to this section (Section 2) is that the acts it seeks to punish, being committed within a State, can only be defined and punished as a crime under State law. It also seems thereby to assume that there are no classes of acts which both the State governments and the National government may define and punish concurrently as constituting a crime against each government. Mr. Speaker, I deny the soundness of each of these assumptions." Cong. Globe, Appendix, p. 69. See similar statements by Chairman Shellabarger, pp. 382, 478; and of Representative Dawes, member of the Committee, pp. 475-6. It is to be noted that Section 2 contained a criminal sanction as well as the civil sanction embodied in Section 47(3). See full text *infra*, Appendix, pp. 38-40.

stitution of the United States, and for other Purposes", does not mitigate against the conclusion that Congress intended the second section to apply to private individuals. As the Circuit Court pointed out with ample documentation, in the enactment of the second section, "it was the theory of Congress that the Fourteenth Amendment gave the Federal Government power to protect individual civil rights against individual action" (R. 66-67). It is similarly clear from the legislative history that the use of the word "equal" in the phrase "equal protection of the laws and equal privileges and immunities under the laws" cannot be relied upon, as it was in the District Court's opinion (R. 24-25), to contradict the conclusion that section 47(3) applies to private individuals. For the term "equal" was employed merely in order to express more clearly the Congressional intention "to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section" (Statement of Representative Shellabarger, Cong. Globe, p. 478).

Likewise the scope of 47(3) cannot be determined by a play upon the word "deprive". If there can be no "deprivation" of a right as long as there are means for its vindication (see dissenting opinion, R. 78), then it is clear that "deprivation" in Section 47(3) was intended to refer to deprivation of enjoyment of the right to equal protection and equal privileges and immunities; for if otherwise construed, the statute would senselessly establish a method

for vindicating a wrong which becomes non-existent once a method of vindication is established.[1]

C. Meaning of Parallel Provision

Section 47(3) has a criminal parallel in section 241 of Title 18 of the United States Code, which likewise imposes a sanction "if two or more persons conspire * * * or * * * go in disguise on the highway, or on the premises of another"[2] to interfere with Federal rights. Chairman Shellabarger stated that section 2 of the 1871 Act, from which 47(3) is derived, was identical in its legal grounds with the section of the 1870 Act from which 241 is derived; and it was explained that the purpose of the 1871 provision was to render the 1870 provision less vague and general, as well as to establish a civil sanction, which had not been employed in the earlier Act.[3] Thus, not only because of the identity of language but because the sections are clearly shown by the legislative history to be *in pari materia*,[4] the established construction of section

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[1] And where, as here, the deprivation of Federal rights is the issue, the argument that an action under State law can provide vindication (see dissenting opinion, R. 79), is inapplicable. For further discussion of the inutility of State actions, see *infra*, p. 33.

[2] While there are interpolations between the above-quoted terms of Section 241, as shown by the elisions, the succession of terms in the section as it originally appeared in the Act of May 31, 1870, was as above-quoted without interpolations, and was thus identical with the terms of Section 2 of the 1871 Act. Section 241 and Section 6 of the 1870 Act, from which it was derived, are set forth in the Appendix, *infra*, pp. 43, 37.

[3] Cong. Globe, Appendix, pp. 68-9; and see pp. 461, 383.

[4] Compare *Picking* v. *Pennsylvania R. Co.*, 151 F. (2d) 240, 248-9 (C. A. 3rd, 1945), where the Court held that the civil rights sections relating to acts under color of State authority (8 U. S. C. 43 and 18 U. S. C. 242) are *in pari materia* and that the civil section must be given the construction theretofore given to the criminal section by the Supreme Court. See *Southland Gas Co.* v. *Bayley*, 319 U. S. 44, 47; as to the necessity for similarity of construction of statutes *in pari materia*.

241 is highly persuasive as to the proper construction of 47(3).

It has been settled, beyond question by the cases construing section 241, that "two or more persons" means *any* persons, whether or not acting under the aegis of State Law. *Ex parte Yarbrough,* 110 U. S. 651; *Logan* v. *United States,* 144 U. S. 263; *United States* v. *Classic,* 313 U. S. 299, 315. In each of these cases, the Court rejected defendants' contention that only "state action" was proscribed by section 241.

Finally, in *United States* v. *Harris,* 106 U. S. 629, the Court construed section 5519 of the Revised Statutes, which had incorporated the very language of the 1871 Act here in issue, and it was unequivocally held that the phrase "two or more persons" refers to private individuals.[1]

2. Section 47(3), through its provisions respecting "equal privileges and immunities of the laws" and "any right or privilege of a citizen of the United States," applies to the privilege to assemble to discuss national affairs and petition Federal officials.

It is incontrovertible from the legislative history that the primary purpose of section 47(3) was to protect the rights relating to the operations of the Federal government "inherent in a citizen of the United States by virtue of the Constitution."[2] These rights had been customarily categorized, and were categorized in the debates, as "priv-

[1] Section 5519, set forth *infra,* Appendix, p. 42, embodied the criminal phase of Section 2 of the 1871 Act from which Section 47(3) was likewise derived. Other aspects of the *Harris* decision are discussed, *infra,* pp. 24-26.

[2] Statement by Representative Cook (draftsman of the substitute bill finally enacted), Cong. Globe, pp. 485-486; see similar statements by Chairman Shellabarger, Cong. Globe, p. 382; by Representative Dawes, a member of the House Committee, Cong. Globe, pp. 475-6; by Senator Edmunds, Senate Manager of the Bill, Cong. Globe, p. 695.

ileges and immunities";[1] that they were intended to be protected by the provisions respecting "privileges and immunities under the laws" [2] and "any right or privilege of a citizen of the United States,"—which are the provisions involved in the case at bar,—is thus clear and unmistakable.[3] It is likewise clear, and has not been questioned throughout this litigation, that the privilege whose violation is charged in the instant complaint—of assembling to discuss national affairs and to petition Federal officials—is one of the inherent Federal rights and thus was incorporated by reference in section 47(3).

Accordingly, since section 47(3) applies to a conspiracy by private individuals, if acts are performed in furtherance thereof, to deprive citizens of the privilege here involved, the Circuit Court was correct in its holding that the instant complaint states a cause of action.[4]

3. The Court should not in the case at bar consider the construction of the "Equal Protection" provision of Section 47(3).

Since the complaint invokes and is authorized by the provision of 47(3) dealing with deprivations of equal privileges and immunities, we submit that it is inappropriate to consider in the instant case the scope and validity

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[1] Statement of Chairman Shellabarger, Cong. Globe, Appendix, p. 69, discussed by Circuit Court, R. 67; statement of Representative Dawes, member of House Committee reporting out the Bill, Cong. Globe, p. 476.

[2] Even apart from the legislative history, such inclusion would be assumed since the Constitution is customarily described as part of the laws of the United States (i.e., see such reference in Art. VI, Sec. 2 of the Constitution).

[3] If the provision respecting acts injurious to person or property is also deemed to be invoked by the instant complaint, its application herein is limited to acts in furtherance of a conspiracy directed at "privileges and immunities under the laws".

[4] As to questions relating to the complete scope of the provisions on which the instant action is founded, see *infra*, note 2, p. 29.

of the section's provision with respect to deprivations of "equal protection of the laws", which was considered by the Circuit Court (R. 73-75). Applicable here is this Court's long-established doctrine, which the Circuit Court disregarded, that

> "We confine ourselves to so much of the act assailed as was construed and applied in the present case. If there should arise a case in which this legislation is sought to be applied * * * [which] would be beyond legislative restraint, it will be time enough for interference by the courts. As observed in *Smiley* v. *Kansas*,[1] where the breadth of the act was criticized, 'Unless appellant can show that he himself has been wrongfully included in the terms of the law, he can have no just ground of complaint.'" *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 442.[2]

While there may be exceptions to this doctrine in the case of some criminal statutes (see *Thornhill* v. *Alabama*, 310 U. S. 88, 95), there is no room for an exception in the case of the instant civil statute. Indeed, restraint in review is here especially necessary, for construction of the equal protection provision impinges on difficult Constitutional questions; and Constitutional issues, in particular, "are not to be dealt with abstractly", but only when presented by the facts before the Court. *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, 22.[3] Furthermore, an

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[1] 196 U. S. 447.

[2] "If there should be any objections to a wider application [of the statutory phrase], they do not affect the respondent and are not open here." *Young Co.* v. *McNeal* v. *McNeal Edwards Co.*, 283 U. S. 398, 400. For other examples of this often-used principle, see also *Kelly* v. *State of Washington ex rel. Foss Co.*, 302 U. S. 1, 16; *Joslin Co.* v. *Providence*, 262 U. S. 668, 675, in both of which the Court refused to consider other possible applications of the statutory sections there at bar; see also *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700, 709-710.

[3] See *Heald* v. *District of Columbia*, 295 U. S. 114, 123: "It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is within

important issue with respect to the equal protection provision is its workability (discussed *infra*, pp. 23-24), and proper determination of this issue would be obviously aided by considering the provision in the light of its specific application.

4. Assuming *arguendo* the propriety of considering the "Equal Protection of the Laws" provision, it is valid and constitutional.

Assuming *arguendo* that the meaning of "equal protection of the laws" is to be considered, the primary guide in the resolution of any uncertainty in the language is the rule that "The obligation rests * * * upon this Court in construing Congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality" (*United States* v. *C.I.O.*, 335 U. S. 106, 120-121). And a reading of the language in the light of the legislative history demonstrates that this phrase does not embrace the "equal protection of State laws", which concededly would raise a troublesome Constitutional problem; rather, Congress used it in a broad sense to refer, with "equal privileges and immunities", to the equal enjoyment of rights assured to the individual by the Constitution by reason of their connection with the functioning of the Federal Government, or of rights granted to him by Federal statute.

The purpose of section 2 to protect the rights of United States citizens connected with the operation of the Fed-

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the class of persons with regard to whom the act is unconstitutional and that the alleged unconstitutional feature injures him (citing cases). In no case has it been held that a different rule applies where the statute assailed is an act of Congress; nor has any good reason been suggested why it should be so held" (comparing cases) (per Brandeis, J.).

eral government,[1] is underscored by the purpose of the 1871 Act as a whole. For the whole thrust of the Act is towards assurance of respect for Federal laws and for rights affecting the Federal Government's performance of its functions,[2] and thus confirms the conclusion dictated by the legislative history of the section that Congress was not concerned with the protection of State laws when it referred to equal protection.[3] Further, the legislative history shows that the phrase "equal protection of the laws and equal privileges and immunities under the laws" was intended to have the same general scope as the phrase "rights, privileges or immunities of any person, to which he is entitled under the Constitution and laws of the United States", which was the language used in the original draft of the section.[4] The change of verbiage, with inclusion of the phrase "equal protection", was not intended to import a reference to any particular right, but merely to emphasize that the acts proscribed were those depriving a citizen of the enjoyment of his rights to the same extent as

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[1] See references to legislative history, *supra*, note 2, p. 17. The statements as to the purpose of section 2 applied to all the new matter enacted, without differentiation as to particular phrases. Much of the section other than the provisions here in issue was taken over from a prior Act (see note 1, p. 14).

[2] See Act of April 20, 1871, *passim*, Appendix, pp. 37-42.

[3] All other rules are "subordinate to the doctrine that courts will construe the details of an act in conformity with its general purpose, will read the text in the light of the context, and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350. An "ambiguity of phrase * * * yields to the intent of Congress as disclosed by the legislative history. In such circumstances we follow the general purpose of the Act." *Colgate-Palmolive-Peet Co.* v. *United States*, 320 U. S. 422, 429.

[4] See Cong. Globe, p. 317, for the initial form of the Bill which became the 1871 Act, and p. 477 for acceptance of substitute containing language finally enacted.

other citizens.[1] Finally, that the phrase "equal protection" does not denote any intention of referring to the protection of State laws as among those rights, is established by the statement of Senator Edmunds, the Senate Manager of the Bill, who explained that section 2 only applied to "a conspiracy to deprive citizens of the United States * * * *of the rights which the Constitution and the laws of the United States* made pursuant to it give to them; that is to say, conspiracies to impede the course of justice, conspiracies to deprive the people of *equal protection of the laws, whatever those laws may be*" (Cong. Globe, p. 568, italics added).[2]

It seems clear, therefore, that the "equal protection" phrase was not tied to the concept of the protection of State laws;[3] rather, it was intended in the same general

[1] See *supra*, p. 15.

[2] While there may be some intimations in the Congressional debates suggesting a desire for the phrase to embrace the protection of State laws as well, this Court has often noted that all claims made in the course of debate cannot be taken as authoritative; and we submit that the quoted statement of the Senate Manager, after the Bill's various revisions, is highly persuasive as to Congressional purpose.

[3] That the "equal protection" provision was not intended in this technical sense is internally evidenced by the fact that it covers persons in any Territory as well as any State.

Section 2 of the 1871 Act also contained provisions with respect to "hindering the constituted authorities of any State from giving * * * to all persons within such State the equal protection of the laws" "or * * * obstructing * * * the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws." Despite the mention of State processes in these clauses, they may well refer to protection of the citizen's rights under *Federal laws*, in view of the provision for this type of "equal protection" by State authorities in section 3 of the 1871 Act (see Appendix, p. 41), and in view of the reference to the course of justice *in*, rather than of, any State or Territory. In any event, the meaning of equal protection in these clauses does not determine its meaning in the clause here in issue (see *Lawson* v. *Suwanee Fruit and Steamship Co.*, 336 U. S. 198, for an example of differing constructions of the same term in various parts of a statute).

sense as "equal privileges and immunities"—the two phrases to be read without sharp differentiation in the conjunctive rather than the disjunctive—with "equal protection" regarded, however, as looking more toward Federal statutory, than Constitutional, rights. Accordingly, it is clear that Congress deliberately refrained from specifying the rights covered by 47(3) in order to insure their enunciation in the light of its Constitutional power to afford protection against the acts of private individuals,[1] and that the phrase respecting "equal protection" was not so intended that it permits frustration of this purpose by construing the section as applying to rights lying outside Congressional power. Under these circumstances, to insist on construing "equal protection" as referring to State law would mean to abandon the cardinal principle of attempting to find a construction consistent with the Constitution, and to reject the construction which was intended by the Congress and would save the statute's constitutionality.

If there were any linguistic difficulty about effectuating the intention of Congress for the equal protection provision to apply to private individuals (see dissenting opinion, R. 78), "The compactness of phrasing and lack of strict grammatical construction does not obscure the intent of the Act."[2] In fact, however, if read as the legislative history dictates, the phrase has a thoroughly workable meaning; thus, in a case such as *United States* v.

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[1] See statement as to the non-specification of the rights, by Representative Dawes, a member of the House Committee which reported out the Bill, in concluding debate on it, Cong. Globe, p. 475.

[2] *United States* v. *Gaskin*, 320 U. S. 527, 529, referring to the peonage provision of the civil rights legislation.

Waddell,[1] which arose under the parallel criminal section, where a homesteader was forced off his land before he could satisfy the requirements that under Federal law would have assured his title, he would quite literally be deprived by private individuals of the equal protection of the Federal laws.

The Decision in United States v. Harris[2] Is Not Authoritative in the Case at Bar.

The *Harris* decision cannot be regarded as authority for construing the phrase "equal protection of the laws" in Section 47(3) as a reference to State laws.

The *Harris* case arose under Section 5519 of the Revised Statutes, which was later repealed; Section 5519 embodied the criminal phase of section 2 of the 1871 Act from which 47(3) was derived and incorporated language similar to 47(3) with respect to conspiracies (see Appendix, p. 42). The case involved the indictment of a number of individuals under Section 5519 for conspiracy to deprive another individual of equal protection of the laws in that they attacked him while he was under arrest by State officers. Stating that the only possible sources of power for the enactment were the 13th, 14th, or 15th Amendments or the privileges and immunities clause of Article 4, Section 2, the Court held that the equal protection provision was unconstitutional on the basis that "it applies, no matter how well the State may have performed its duty. Under it private persons are liable to

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[1] 112 U. S. 76.

[2] 106 U. S. 629.

punishment for conspiring to deprive anyone of the equal protection of the laws enacted by the State" (106 U. S. at p. 639).

Perhaps in an anxiety to assert the precept that the newly adopted Constitutional amendments only conferred narrow powers on the Federal government, the Court's opinion is based on a disregard of fundamental principles of judicial review and statutory construction which seriously weakens its value as a precedent. Under present-day doctrine it is fundamental that the Court should have considered whether there was any construction of the "equal protection" provision which would have saved its constitutionality,[1] rather than assuming, as the Court did, that the indictment was authorized by the statute, and forthwith condemning the statute as unconstitutional. Without attempting to resolve any ambiguity of language in favor of constitutionality, the Court totally ignored the legislative history, which establishes that "equal protection" in the equal protection and equal privileges and immunities provision of Section 2 of the 1871 Act was in fact intended in a sense consistent with Congressional power, and was not intended to refer to State laws (*supra*, pp. 21-23). Connected with the failure to consider the legislative history and the derivation of 5519 from the 1871 Act, was the failure of the Court to consider as the Constitutional source of authority for Section 5519, and as a lead to its correct construction, the Congressional power under the original Constitution to protect the citizen in his rights related to the functioning of the Federal government.[2]

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[1] See *supra*, p. 20.

[2] It is further to be noted that even assuming equal protection referred to State laws, the Court posited its determination of unconstitutionality on the statute's application to crimes such as burglary or assault, against which the State authorities were free and able

The problem of construction in the instant case is clearly distinguishable from that in *Harris* in that the statute there construed was criminal rather than civil; and the rule of favoring a strict construction, which might be deemed to justify the failure to seek a constitutional construction, was therefore applicable.[1] Furthermore, section 47(3) contains an explicit reference to the "right or privilege of a citizen of the United States", which did not appear in section 5519, and which highlights the Congressional intention for section 47(3) to cover only rights related to the operation of the Federal government rather than those related to State law. In view of the deficiencies of the *Harris* opinion together with the clear grounds for distinction between it and the instant case, we submit that it cannot be regarded as an authority herein.

5. Assuming *arguendo* that the "Equal Protection" Provision is invalid, it is a separable phase of section 47(3) and does not affect the validity of the portions here involved.

Assuming *arguendo*, however, that the "equal protection of the laws" provision refers to State laws in addition to or in place of Federal, and assuming that it was to that extent outside Congressional power, the validity of the parts of section 47(3) on which the instant cause of action depends, is not affected. For the dominant intent of Congress in enacting section 47(3) unquestionably was to protect whatever rights the Constitution empowered it

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to grant protection. (106 U. S. at p. 639). In fact, however, the indictment posed the narrower question of an interference with State authorities who were attempting to discharge their Federal duty of equal protection; so limited, it might have been within Congressional power, despite the fact that no Federal right is involved on the facts assumed by the Court.

[1] See *Baldwin* v. *Franks*, 120 U. S. 678, discussed *infra*, where the Court again construed section 5519 and relied on the fact that it was a criminal statute in distinguishing opinions dealing with the construction of civil statutes.

to protect against private individuals; if Congress mistakenly considered that the right to equal protection of the State laws was among these rights, this mistake does not negate, and cannot be permitted to frustrate, its underlying purpose to protect rights which, like those involved in the case at bar, the Constitution in fact places under its direct protection.

The sole criterion of separability of the various phases of statute is "What was the intent of the lawmakers?" (*Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312). And this question is to be answered by determining whether, if the invalid provision had been deleted, the statute would nevertheless have been passed (ibid., at pp. 313, 315).[1] Under this test, there is no doubt of the separability of the "equal protection" portion of section 47(3). Congress was interested in legislating as to "equal protection" only because it believed the Constitution gave it the power to protect this right. It obviously would have sought to fulfill its basic purpose of protecting Federal rights against the acts of individuals even if it had known that this right was not among them.

The decision in *Baldwin* v. *Franks*, 120 U. S. 678, with respect to the separability of section 5519 of the Revised Statutes cannot be regarded as authoritative herein, for much the same reasons as the Harris decision cannot be followed. In *Franks* an individual was charged with conspiring to deprive a group of Chinese aliens of "equal protection of the laws and equal privileges and immunities

[1] "The rule is well settled that if one part of a statute is valid and another invalid the former may be enforced * * * [unless] it be * * * clear that the legislature would not have passed that part without the part that may be deemed invalid." *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 121.

The basic problem is not affected by the presence or absence of a separability clause; the absence of such a provision merely places the burden on the supporter of the legislation to show separability (*Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312).

under the laws," by conspiring to expel them from their town of residence and thus deprive them of rights they possessed under the Constitution and Treaties between the United States and China. Relying without re-examination on the *Harris* opinion that the equal protection provision of 5519 embraced the protection of State laws, the Court thereupon held that the coverage of conspiracies directed at Federal rights was inseparable from the coverage of those directed at non-Federal rights. In coming to this conclusion, however, the Court completely disregarded the legislative intent, which is the sole criterion of separability (see supra, p. 27). Instead, it rested its conclusion on the mere fact that both the invalid and the valid coverage were embraced in a single provision (120 U. S. at p. 684) a factor which is not, at least under present-day doctrine, regarded as significant.[1]

Besides the weaknesses of the *Franks* opinion, it could not in any event serve as a precedent in the instant case of a civil statute. For the Court explicitly rested its refusal to follow authorities holding statutes separable, on the ground that they were civil and that a strict construction was applicable to 5519 because it was a criminal statute (120 U. S. at p. 689). Further, the major basis for the *Franks* holding—that the provisions of 5519 there invoked embraced State as well as Federal rights—does not apply to the provisions of 47(3) here involved. As the Circuit Court pointed out, the provision of 47(3) which is here relied upon as establishing defendants' liability is that respecting acts in furtherance of a conspiracy whereby persons are "deprived of having and exercising any right or privilege of a citizen of the United States"; this clause, which did not appear in section 5519, is ex-

[1] See *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304, 313; and cases cited *supra*, note 2, p. 19, in which the Court upheld statutes as applied to the facts at bar, regardless of whether the statutory terms there involved might be invalid under other intended constructions.

plicitly and exclusively directed at rights under Federal law, and cannot be deemed to "embrace rights under State law" (see Circuit Court's opinion, R. 74).[1] In addition, the legislative history irrefutably demonstrates that "equal privileges and immunities under the laws", the other provision here involved, also refers to the rights of a United States citizen[2]; and since the terms privileges and immunities were used in this sense in the Fourteenth Amendment as well, no argument can be presented, as in the case of equal protection, that attention was focussed at the time of the enactment on the use of the phrase in any other sense.[3] Finally, the *Franks* opinion indicates that even under section 5519, a cause of action like the instant one, which did not rest on the equal protection provision, but only on equal privileges and immunities, might have been valid.[4]

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[1] Thus, this provision, treated as separable from that relating to acts, injurious to person or property, restricts the applicaiton of the statute to Federal rights, even if State rights are deemed inseparably embraced by the clause describing the conspiracies.

[2] See p. 17, *supra*.

[3] While it is indubitable from the legislative history that Congress was referring in the provisions here involved only to rights as a Federal citizen, it also appears that Congress hoped that the privileges it was protecting were of a broader scope than the Constitution in fact permits (see references to legislative history, *supra*, note 2, p. 17; note 1, p. 18). However, since Congress deliberately refrained from specifying them, so that the statutory phrases would be interpreted in accordance with the scope of its Constitutional powers to protect citizens directly (see *supra*, p. 23, at note 1), these phrases should not be read as incorporating all the privileges mentioned in the Congressional debates. But even if the contrary view of construction were taken, and if the problem of the entire coverage of these provisions were to be considered in the instant case despite the principles discussed in Point 3, *supra*, the valid coverage must be held separable from the invalid on the basis of the separability argument set forth in the text with respect to the equal protection provision.

[4] It is clear that the Court did not regard all of section 5519's provisions as inseparable, for it pointed out that the section might be susceptible of valid application in a Territory (120 U. S. at p. 685).

In view of the disregard in the *Franks* opinion of the Congressional intent as shown by the legislative history, and in view of the cogent grounds for distinguishing the *Franks* case from the instant one, it cannot be deemed authoritative in the case at bar.

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We submit that (1) the instant cause of action is based upon, and authorized by, the provision of section 47(3) respecting "equal privileges and immunities under the law", and that the provision respecting "equal protection of the laws" need not and should not be considered; (2) if equal protection is to be considered, the legislative history and fundamental doctrines of statutory construction require that the phrase be interpreted as referring to Federal laws; (3) even if the equal protection provision be interpreted as referring to State laws, and as outside Congressional power, the portions of section 47(3) here involved refer to Federal rights and must be treated as separably valid; for the sole criterion of separability is the legislative intent, and the purpose animating Congress to enact section 47(3) undoubtedly was its desire to protect, without particularization, the rights of citizens of the United States against the acts of private individuals to the extent it was constitutionally empowered to do so.[1]

[1] If "equal protection of the laws" were deemed to refer to State laws, and if it were deemed an inseparable part of section 47(3), it would be necessary to consider the questions ignored in *Harris* and *Franks* of whether the provision should be construed to refer to acts preventing State authorities from affording police protection, and of whether it would be valid if so construed (see note 2, p. 25, *supra*). However, we shall not brief this novel point, because of the unlikelihood of an occasion for its determination in the instant case.

6. Construction of 47(3) as authorizing the instant cause of action is an important step in the effectuation of the Federal Civil Rights legislation and will not cause an undue burden of Federal litigation.

A. This Court has already upheld the sections of the Federal Civil Rights Law providing for civil and criminal remedies for violations of Federal rights by persons acting under color of State law,[1] and section 241 providing for a criminal action against violations by private individuals[2]; the assertion of the right to a civil cause of action against private individuals, by the validation of section 47(3), is necessary to complete the pattern of protection Congress sought to establish. And, as this Court has pointed out,[3] it is of special importance to implement the sections of the civil rights act now extant, because Congress has preserved them for more than a century, despite its repeal of numerous other sections of the original civil rights legislation. Similarly, in construing the criminal parallel to section 47(3), Mr. Justice Holmes declared:

> "The source of this section in the doings of the Ku Klux and the like is obvious * * * (But the) section * * * had a general scope and used general words that have become the most important now that the Ku Klux has passed away."[4]

The remedy for a violation of Federal rights committed through the mob action of private individuals, supplied by section 241 and section 47(3), is fully as impor-

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[1] A criminal action for such a violation is provided by 18 U. S. C. section 242, upheld in *United States* v. *Classic*, 313 U. S. 299, and *Screws* v. *United States*, 325 U. S. 91; a civil action is established by 8 U. S. C. 43, upheld and enforced in *Smith* v. *Allwright*, 321 U. S. 649; *Hague* v. *C. I. O.*, 307 U. S. 496.

[2] See the series of decisions under 18 U. S. C. 241, *supra*, p. 10.

[3] *Screws* v. *United States*, 325 U. S. at p. 100.

[4] *United States* v. *Mosley*, 238 U. S. 383, 388.

tant as a remedy against violations under color of State law, in preserving the right of the people, particularly of unpopular minorities, to speak on Federal affairs as well as their other Federal rights.[1] Further, the civil cause of action is of equal significance with the criminal in the maintenance of these rights. For official reluctance to prosecute for a deprivation of Federal right may well coincide with mob hostility to it; moreover, a jury may be willing to render a civil verdict for the infringement of political rights, while viewing them with insufficient concern to impose a criminal penalty.[2] Thus, the certainty by virtue of 47(3) that redress can be sought for a violation of Federal rights, even if, because of its political significance or for other reasons a criminal prosecution is not instituted, will serve as a significant deterrent to violations, and as a safeguard of the universal security of the rights essential to a representative government.

The chance that the aid of State police may be obtained to prevent deprivations of Federal rights, as suggested by the dissenting Judge in the court below (R. 88),[3] or

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[1] Thus, District Judge Yankwich, though dismissing the complaint, stated: "We grant that the acts complained of * * * are manifestations of that ignoble mob spirit which is so abhorrent to a free, decent and democratic society * * *." (R. 40). And see the statement by Mr. Justice Clark, penned while Attorney General: "Our democracy suffers a grievous, if not fatal, blow when the processes of law and order are broken down by mob violence." Clark, *A Federal Prosecutor Looks at the Civil Rights Statute*, 47 Col. Law Rev. 175, 185 (1947).

[2] See Carr, *Federal Protection of Civil Rights* (1947), pp. 14, 60, 148-9; *"To Secure These Rights,"* Report of President's Committee on Civil Rights (1947), pp. 117-118.

[3] Consider *Robeson v. Fanelli*, decided by the District Court for the Southern District of New York, Nov. 10, 1950, per Ryan, J., in which the complaint alleged that State police officials had knowingly failed to prevent violations of section 47(3); motion to dismiss the complaint was denied. And resort after the event to a Federal cause of action could hardly deter effective state policing of meetings, as suggested by the dissenting Judge in the Court below [R. 87].

that the conduct infringing Federal rights might give rise to a State cause of action—which are possibilities in the case of all the other sections of the civil rights legislation as well as 47(3)—does not negate the importance of 47(3). The Federal Government need not rely for the protection of essential Federal rights on the inadequate and haphazard aid to be derived from diverse State remedies. It is only Federal action specifically directed at the protection of the Federal rights, with the gravity of the conduct and of the resultant damages measured in terms of their invasion, which can vindicate the Federal rights, redress their deprivation, and serve as a nationwide deterrent to their violation. The Federal right of action was established not only for the sake of the deprived citizen but also for the sake of the "healthy organization of the government itself." [1]

As pointed out in *Ex Parte Yarbrough*:

> "It is said that the states can pass the necessary law on this subject, and no necessity exists for such action by Congress. But the existence of State laws punishing the counterfeiting of the coin of the United States has never been held to supersede the Acts of Congress passed for that purpose, or to justify the United States in failing to enforce its own laws to protect the circulation of the coin which it issues" (110 U. S. at p. 659).

B. As the Circuit Court pointed out (R. 72), since the scope of the privileges and immunities derived by the citizen from the original Constitution, which are the only rights definitively assured protection by the construction here in issue, is narrow,[2] the volume of litigation arising

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[1] *Ex parte Yarbrough*, 110 U. S. 651, 666.

[2] See note 4, *supra*, p. 10 for rights in this category; see *United States* v. *Wheeler*, 254 U. S. 281; *Hodges* v. *United States*, 203 U. S. 1; *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, as to the limitations of this category.

from the instant construction is not likely to be large. Without considering in detail the questions of what type of Federal rights [1] and what type of interference with them, other than that here involved, might be deemed covered by 47(3), we wish to point out that the extreme view of the possible scope of the section suggested by the dissenting judge below, is not warranted by the legislative history.[2]

But, in any event, the speculative nature of the inquiry as to the possible amount of litigation under 47(3) confirms the wisdom of the Circuit Court's assertion that the section must be given effect in accordance with the legislative intent regardless of this factor (R. 75). And whatever the effect on the volume of litigation, multiple repetition of the attack on Federal rights is not and should not be required as an element of a cause of action under section 47(3) (compare District Court opinion, R. 33).[3] To force citizens to undergo repeated deprivations of their rights before redress is open to them, would discourage them from attempting to exercise their rights as citizens, and would cause violation of Federal rights to become a rooted pattern.

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[1] As to the range of rights protected, consider *United States* v. *Berke Cake Co.*, 50 Fed. Supp. 311 (E. D. N. Y., 1943) in which it was held that section 241, the criminal counterpart of 47(3), only protected those rights individuals possess *as citizens*, rather than their rights under all Federal statutes.

[2] The legislative history clearly indicates that the statute was to apply to "confederated violence" (see Cong. Globe Appendix p. 69) and not to non-violent opposition to meetings (compare dissenting opinion, R. 87).

[3] Such a requirement has no support whatever in the language or history of section 47(3), nor in the cases construing section 241, the parallel criminal provision. Nor has it support in general doctrine; thus there may be a denial of equal protection of the laws, "though it is neither systematic or long-continued." *Snowden* v. *Hughes*, 321 U. S. 1, 9-10.

CONCLUSION

The requirements for a cause of action, as set forth in Section 47(3), are fully met by the allegations of the complaint. The requirement that "two or more persons in any State * * * conspire * * * for the purpose of depriving * * * any person * * * of equal privileges and immunities under the laws," is satisfied by the allegations that petitioners within the State of California conspired to deprive respondents of their privilege under the Constitution, which was being enjoyed by other citizens, to assemble to petition Congress and to discuss national affairs. 47(3) further prescribes that "in * * * case of [such] conspiracy * * * if one or more persons engaged therein do * * * any act in furtherance of the object of such conspiracy, whereby another is deprived of having and exercising any right or privilege of a citizen of the United States, the party so * * * deprived may have an action for the recovery of damages, occasioned by such * * * deprivation, against one or more of the conspirators." Here, in furtherance of the conspiracy against respondents, petitioners intimidated and assaulted respondents, thus breaking up their assembly, and depriving them of having and exercising their privileges as citizens of the United States.

The cause of action stated in the instant complaint: acts of force and violence, pursuant to a conspiracy, to deprive citizens of their right to assemble to discuss national affairs and to petition Federal officials—is clearly within the scope of section 47(3), within the power of Congress to establish as a Federal suit, and within the sphere in which Congressional protection is highly appropriate, for it is a right long established to be essential to "the very idea of a government, republican in form." [1]

[1] *United States v. Cruikshank*, 92 U. S. 542, 552.

It is submitted, therefore, that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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APPENDIX

Act of May 31, 1870 (16 Stat. 140).

An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes.

Sec. 6. And be it further enacted, That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court—the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years—and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

Act of April 20, 1871 (17 Stat. 13).

An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any

State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

Sec. 2. That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on

account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of

the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."

Sec. 3. That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any

State shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States; and in all such cases, or whenever any such insurrection, violence, unlawful combination, or conspiracy shall oppose or obstruct the laws of the United States or the due execution thereof, or impede or obstruct the due course of justice under the same, it shall be lawful for the President, and it shall be his duty to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary for the suppression of such insurrection, domestic violence, or combination; and any person who shall be arrested under the provisions of this and the preceding section shall be delivered to the marshal of the proper district, to be dealt with according to law.

Sec. 4. That whenever in any State or part of a State the unlawful combinations named in the preceding section of this act shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State, or when the constituted authorities are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations; and whenever, by reason of either or all of the causes aforesaid, the conviction of such of-

fenders and the preservation of the public safety shall become in such district impracticable, in every such case such combinations shall be deemed a rebellion against the government of the United States, and during the continuance of such rebellion, and within the limits of the district which shall be so under the sway thereof, such limits to be prescribed by proclamation, it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of the writ of habeas corpus, to the end that such rebellion may be overthrown:

[There follows provisions with respect to habeas corpus and the proclamations.]

The remaining sections of the Act relate to trials of offenses thereunder, neglect or refusal to prevent the acts proscribed thereby, and its effect on previous Acts.

Revised Statutes, Section 5519.

"If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

18 United States Code

"§ 241. *Conspiracy against rights of citizens.*

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $5,000. or imprisoned not more than ten years, or both."

§ 242. *Deprivation of rights under color of law.*

Whoever, under color of any law, statute, or ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000. or imprisoned not more than one year, or both."

8 United States Code

"§ 43. *Civil action for deprivation of rights.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the

United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. § 1979."

No. 217

IN THE

Supreme Court of the United States

October Term, 1950

ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD, JAMES E. DOGGETT AND RALPH BAKER,
Petitioners,

v.

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS AND MRS. MABLE L. PRICE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

The Congress of Industrial Organizations submits this brief as *amicus curiae*. The written consent of all parties to the case to the filing of this brief has been filed with the Clerk.

Interest of the Congress of Industrial Organizations

The filing of this brief does not in any way mean that the CIO agrees with the political views apparently held by the petitioners. On the contrary, the CIO endorses the Marshall Plan, and its representatives have repeatedly appeared before congressional committees in support of the Plan. Nevertheless we consider it to be vitally important to the preservation of democracy that all persons be protected in their right to

advocate any lawful course of action, without interference by self-appointed vigilantes.

Moreover, organizers for the CIO and its affiliated unions often must operate in communities dominated by entrenched and powerful groups hostile to unions. In these communities employer stimulated mobs are frequently used to prevent union organizers and members from exercising their constitutional rights of free speech and assembly. The CIO, therefore, has a direct concern that the protection of Constitutional and other federally created rights shall not be cut down by a narrow construction or an adjudication of unconstitutionality of the Civil Rights Act.

In general, we agree with the position which is taken in this Court by the respondents. In the interest of conserving the Court's time we will not repeat those arguments, but will endeavor to state concisely certain somewhat different considerations which we believe should lead to affirmance of the judgment of the Court of Appeals.

I.

The Complaint States a Cause of Action Under Section 47(3) of Title 8 of the United States Code

We submit that the allegations of the complaint, which are summarized in the respondents brief, clearly state a cause of action within the literal language of the statute.

Section 47(3) is divided into two parts. The first part of the section, down to the final semicolon, describes certain types of conspiracies "by two or more persons" to deprive other persons of certain enumerated and described rights. However, such a conspiracy is made actionable under the latter half of the section only if an act is done in furtherance of the conspiracy "whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States * * *." Thus the first part of the statute describes certain conduct, and the second part makes it actionable if it has certain results.

Both of the statutory requirements are met by the complaint in the present case.

A. The Complaint Alleges Conduct of the Sort Described by the First Part of Section 47(3).

1. The conduct made actionable by the first part of the section (if the results specified in the second portion ensue) includes "If two or more persons * * * conspire * * * for the purpose of depriving * * * any person or class of persons of * * * equal privileges and immunities under the laws * * *."

According to the allegations of the complaint the petitioners conspired to prevent respondents from peaceably assembling for the discussion of national public issues, adopting resolutions with regard thereto, and forwarding them to the President and members of Congress [R. 4-5]. The complaint further alleges that petitioners had not interfered with numerous other public meetings held by persons and organizations adhering to views with which petitioners agreed [R. 6].

That the rights to assemble peaceably, discuss public affairs, and petition the government for a redress of grievances, are "privileges and immunities under the laws" is hardly to be denied. (It will be shown in Point II that they are rights derived from the federal Constitution, and so constitutionally within the protective power of federal legislation.) The statutory requirement that the defendants must conspire to deprive the plaintiffs of "equal" privileges is met by the allegation that other groups holding views more acceptable to the defendants met with no interference from them.

2. The first part of Section 47(3) likewise covers a conspiracy

> "to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; * * *"

It likewise covers a conspiracy "to injure any citizen in person or property on account of such support or advocacy."

Here the complaint alleges that among the principal purposes of the respondents' club was participation in the election of the officials of the United States, including the President,

Vice President and members of Congress [R. 2-3]. And the complaint alleges that the particular meeting which was broken up by the petitioners was held for the purpose of discussing the Marshall Plan and adopting resolutions opposing it which would be forwarded to the President and to members of Congress [R. 4-5].

The nexus between requesting the President and members of Congress to reject the Marshall Plan and "support or advocacy * * * toward or in favor of the election of" a President and members of Congress, is surely sufficiently close to bring the former within the statutory protection explicitly accorded the latter. While it does not appear that an election of federal officials was immediately impending at the time of the meeting or was to be a direct subject of consideration, obviously a request to the incumbent President and the members of Congress to reject the Marshall Plan was directly related to ultimate support or advocacy of the election of particular persons to the Presidency or to Congress.

To interpret the statute as protecting only the right to support or advocate the election of particular candidates, and not as protecting the right of support or advocacy with respect to the controlling underlying issues of principle, would encourage creation of an illiterate and ill-informed electorate. The statutory language "support or advocacy * * * toward or in favor of" indicates a broader purpose to protect legitimate political activity related to the ultimate election of the President, Vice President, or members of Congress. As stated in the opinion of the court below,

> "A representative government cannot function properly unless its officers are informed of the opinions and desires of the people whom they represent."

B. The Complaint Alleges Results of the Sort Described in the Second Half of Section 47(3).

The second portion of Section 47(3)—that is the portion following the final semicolon—provides that a conspiracy within the first part of the section shall be actionable if anyone engages in an act in furtherance thereof "whereby another is injured in his person or property, or deprived of hav-

ing and exercising any right or privilege of a citizen of the United States."

The complaint obviously meets the requirements of this portion of the Subsection. As has already been shown, it alleges the deprivation of rights and privileges of a citizen of the United States. Moreover the complaint specifically alleges injuries to the persons of the respondents by threats of assaults and actual assaults [R. 7-8].

II.

The Statute, Construed to Create the Cause of Action Alleged in the Complaint, Is Constitutional

Section 47(3), construed to create a cause of action against private individuals for the conduct alleged in the complaint, is constitutional. It is within the power conferred by the Constitution upon Congress over each of three different subjects.

A. The Statute Is Within the Power of Congress Over the Election of Federal Officials.

It has been settled ever since *Ex Parte Yarbrough*, 110 U. S. 651, that the Federal Government has power to protect the right to vote at congressional elections against interference even by private individuals. That doctrine was reasserted by the Court in 1941 in *United States* v. *Classic*, 313 U. S. 299. In that case the Court pointed out (313 U. S. at 315) that

> since the constitutional command [*i.e.*, Article I, Section 2] is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth amendments, is secured against the action of individuals as well as of states.

Thus there can be no question as to the constitutionality of that portion of the statute creating a cause of action for conspiracy to intimidate any citizen from giving his support or advocacy toward or in favor of the election of federal officials. As has been shown, the complaint stated a cause of action on this theory, and that alone would support affirmance of the judgment of the court below.

B. Section 47(3) Is Within the Power of Congress to Protect the Right to Assemble to Discuss National Affairs and to Petition Congress.

The First Amendment of the Constitution protects "freedom of speech" against infringement by Congress, and likewise "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Similar protections against state action are implied from the due process clause of the Fourteenth Amendment.

Thomas v. *Collins*, 323 U. S. 516.

But quite apart from these constitutional provisions according protection against governmental infringement, the right to assemble to discuss federal affairs and to petition the federal government for redress of grievances was an inherent right of federal citizenship, under the body of the original Constitution. Thus, the Supreme Court declared in *United States* v. *Cruikshank*, 92 U. S. 542, 552:

> "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."

The Court then went on to say that if the purpose of the defendants in that case had been "to prevent a meeting for such a purpose" the case would have been within the criminal statute (Section 241 of Title 18) whose provisions parallel those of Section 47(3) on the civil side.

It is thus perfectly clear that the right to assemble peaceably to discuss national affairs and to petition for a redress of grievances are "privileges and immunities" under the federal Constitution, and are also rights or privileges "of a citizen of the United States." Therefore it was plainly within the power of the federal government to confer a cause of action for in-

fringement of that right or privilege, as it did by Section 47(3). To the same effect as the quotation from the *Cruikshank* case are *In re Quarles and Butler*, 158 U. S. 532, and *Hague* v. *CIO*, 307 U. S. 496.

C. Section 47(3) Is Within the Power of Congress Under Article IV, Section 4 of the Constitution to Guarantee to Each State a Republican Form of Government.

While the republican form of government clause of the Constitution has not been much looked to as a source of congressional power, Section 47(3) is within both the language and purpose of that clause. The constitutional provision in question directs that "The United States shall guarantee to each State in this Union a republican form of government * * *." The obvious purpose of this clause was to direct the United States to safeguard in every state those basic rights which are essential to the existence of a republican form of government.

It was precisely for that purpose that Section 47(3) of Title 8 was enacted. That Subsection was originally enacted as part of Section 2 of the Act of April 20, 1871 (Chapter 22, Section 2, 17 Stat. 13). It was one of several statutes passed in the years following the Civil War for the purpose of giving federal protection to the constitutional and other federally created rights of Negroes in the South. And while the statutes unquestionably were enacted primarily for the protection of Negroes, they were made applicable in general terms to protect federal rights against local infringement by hostile state or individual action.

The doctrine is, of course, a familiar one that Article IV, Section 4 is not a source of federal *judicial* power. In other words, it confers upon the federal judiciary no power to strike down state legislation or other action on the ground that it is undemocratic. In enunciating this doctrine, however, the Supreme Court has usually added the qualification that while Article IV, Section 4, is not a source of judicial power, it is a source of *congressional* power. See *e.g.* statement of the Court in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 612, that "the enforcement of that guarantee, according to the settled doctrine, is for Congress, not the courts." Accord:

State of Ohio ex rel. Bryant v. *Akron Metropolitan Park Dist. for Summit County et al.*, 281 U. S. 74;

Pacific States Teleph. and Teleg. Co. v. *Oregon*, 223 U. S. 118; and

Marshall v. *Dye*, 231 U. S. 250.

And in at least one case, *State of Ohio on Relation of David Davis* v. *Hildebrant*, 241 U. S. 565, Article IV, Section 4, was pointed to by the Court as the source of congressional legislative power. The Court held, moreover, just as it had held with respect to state action claimed to violate Article IV, Section 4, that when Congress legislates for the purpose of guaranteeing to the states a republican form of government, the validity of its action is a political question and not for the judiciary.

In that case the Congress by statute had authorized the states to create congressional districts, and the machinery utilized in Ohio for the creation of congressional districts reserved to the people the right to approve or disapprove by referendum the state redistricting legislation. Both the state referendum and the federal statute were attacked as in violation of Article IV, Section 4. Chief Justice White, speaking for the Court, rejected the contention in the following language:

> "In so far as the proposition may be considered as asserting * * * that any attempt by Congress to recognize the referendum as a part of the legislative authority of a state is obnoxious to a republican form of government as provided by § 4 of article 4, the contention necessarily but reasserts the proposition on that subject previously adversely disposed of. And that this is the inevitable result of the contention is plainly manifest, since at best the proposition comes to the assertion that because Congress, upon whom the Constitution has conferred the exclusive authority to uphold the guaranty of a republican form of government, has done something which it is deemed is repugnant to that guaranty, therefore there was automatically created judicial authority to go beyond the limits of judicial power, and, in doing so, to usurp congressional power, on the ground that Congress had mistakenly dealt with a subject which was within its exclusive control, free from judicial interference."

III.

Section 47(3) Is to Be Distinguished From Federal Statutes Seeking to Protect Constitutional Rights Derived Solely From the Fourteenth Amendment.

During the same period which saw the enactment of the statute now before the Court, Congress adopted certain other civil rights statutes. Some of these measures looked for their constitutional authority to Section 1 of the Fourteenth Amendment as a source of congressional power. In accordance, however, with the literal language of that section, it was interpreted by the Supreme Court as affording protection only against state action, as distinguished from action by private individuals, and hence as supporting federal legislation affording protection against state action but not such legislation when aimed at individual action. Accordingly, the federal civil rights measures which sought their constitutional authority in the Fourteenth Amendment were held unconstitutional as applied against private citizens. These *Civil Rights Cases*, 109 U. S. 3, were relied upon extensively by the District Court in this case.

As has been explained, however, Section 47(3), as it applies to the present case, does not look for its constitutional sanction to the Fourteenth Amendment, but to the body of the original Constitution. Such cases as the *Civil Rights Cases*, have, therefore, not the slightest relevance. Thus, in the *Classic* case the Court pointed out that the right to choose members of Congress "unlike those guaranteed by the Fourteenth and Fifteenth amendments, is secured against action of individuals as well as of states." 313 U. S. at 315. And in *Ex Parte Yarbrough*, the Supreme Court pointed out (110 U. S. at 655-6) that:

> "The reference to cases in this court in which the power of congress under the first section of the fourteenth amendment has been held to relate alone to acts done under state authority can afford petitioners no aid in the present case. For, * * * it is quite a different matter when congress undertakes to protect the citizen in the exercise of rights conferred by the constitution of the United States, essential to the healthy organization of the

government itself. But it is a waste of time to seek for specific sources of the power to pass these laws."

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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December, 1950.

Supreme Court of the United States

October Term, 1950

No. 217

ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD, JAMES E. DOGGETT and RALPH BAKER,
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vs.

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Respondents.

BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE.*

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The National Association for the Advancement of Colored People submits this brief as *amicus curiae.* The written consent of all parties to the case to the filing of this brief has been filed with the Clerk of the Court.

Statement of Interest.

For more than forty (40) years, the National Association for the Advancement of Colored People has worked unceasingly to foster those political, social and economic conditions in which no individual's opportunity can be limited by race, religion, national origin or ancestry.

To this end, the N. A. A. C. P. has enlisted every legitimate measure—including all legal, political and educational means that can be employed. In a struggle against prejudice, it has recognized that only in a free political and public forum can orderly change be effected in society. Therefore, it has fought for freedom of expression for individuals and groups, in and out of the political process. It has fought for this freedom even for those with whom it disagrees, for it realizes that free communication is indispensable to responsive, responsible government, and antecedent to any change. Free expression, it believes, is choked off as effectively by mob intolerance and violence as by state action.

The N. A. A. C. P. believes that there is a sphere of essential freedom, which the federal government can and must protect, on which the survival of free society hinges, and that certainly to assemble and petition for grievances is within that sphere. It further believes that the Congress so intended, and that that fact is demonstrated in respondents' brief and the opinion of the Court below. However, as a friend of the Court, it would like to perhaps emphasize some matters already alluded to therein and to briefly discuss some points of law which it submits should lead to affirmance of the judgment below.

The opinion below is reported at 183 F. 2d 308.

I.

Section 47(3) covers the action of private persons who infringe certain constitutionally granted rights.

Petitioners and the dissenting opinion below deny that Section 47(3) applies to private persons. They contend that the word "persons" in the statute does not mean "persons" as that word is customarily understood, but

that it is narrowly limited in meaning to "governmental agencies or officials".

In construing a statute, we "assume that Congress uses common words in their popular meaning, as used in the common speech of men * * * " (FRANKFURTER, "Some Reflections on the Reading of Statutes", 47 Col. L. R. 527, 536 (1947)). However, when ambiguities occur, we employ various devices to determine the meaning of the legislature, or if that task proves impossible, under the fiction of determining legislative meaning, we assign a meaning most appropriate under all the circumstances.

For purposes of this case, it seems that no one could question the meaning of "persons", as any ambiguities which the word conjures are in a realm not here relevant—*i. e.*, whether the definition includes certain juristic and artificial entities. Nevertheless, we propose to subject the term "person" to any conceivable analysis to demonstrate that in this case it has no peculiar meaning:

A. General Congressional Definition.

In 1871, *the identical year in which what is now Section 47(3) was passed,* Congress also passed a definition statute, defining, among other things, the word "person". That this was a well considered statute is demonstrated by its gradual formulation during the preceding seven (7) years. In 1864, a manufacturing statute (13 Stat. 258) defined "individual" and "person" by including within the terms such entities as "partnerships, firms, associations * * * corporations". In 1866, a tax law (14 Stat. 163) made a similar definition, adding "bodies corporate or politic".

In 1868, another tax statute (15 Stat. 166) made a similar definition. 1871 marked the appearance of the first general definition of "person". It is to be noted once more

that this definition was passed shortly before the passage of the section we now construe. It stated:

> "* * *
>
> "Sec. 2. *And be it further enacted,* that in all acts hereafter passed * * * the word 'person' may extend and be applied to bodies politic and corporate, and the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense * * *" (16 Stat. 431).

It is also to be noted that Congress did not conceive "officers" and "persons" to be identical, but saw fit to define each separately.

B. No Contrary Specific Definition.

Sometimes, Congress, within a statute, defines the meaning of words used therein. No such definition appears in 47(3). Surely, if another meaning were intended, in view of the common definition of "person", the general definition statute quoted above, internal contradictions which result from petitioners' definition (see the opinion of the Court below, p. 311), and the Congressional practice of providing definitions for particular statutes—surely, a specific definition for purposes of this section would have been provided.

C. No Internal Evidence That Word Is Being Used in Unusual Sense.

All indications from the statute are that "person" means "person" as that word is commonly understood. The same considerations applicable in the discussion of Point "B" above are relevant here. The internal evidence upon which petitioners rely is that the word "equal" some-

how indicates that only the state is capable of causing culpable deprivation. By definition, privileges or immunities bestowed by the national government must be equally distributed. They cannot be enjoyed by some, and not by others. Therefore, any deprivation of a privilege or immunity must be the deprivation of an "equal" privilege or immunity. The word "equal" here merely emphasizes the solemn importance of the activities which are protected. An individual who suppresses one of these essential freedoms assails an "equal" privilege and immunity to the same extent as does a state officer. Because government bestows equality does not mean that only government can take it away.

Petitioners and the dissenting opinion below attempt to back into an unusual definition of "person" by reliance upon a jurisprudential theory of who may grant rights and who may deprive them and their exercise. Granting, *arguendo*, the correctness of the concepts relied upon, at most, we find ourselves with a statute which presents certain internal contradictions. The meaning of the statute then must be resolved in terms of the various probabilities presented heretofore, and below, and in the light of considerations of public policy, as discussed more fully below.

D. The Customary Congressional Usage.

We have examined the customary use to which Congress put the word "person" before and at the time of the passage of 47(3). Since then Congress has defined "person" scores of times never suggesting that "person" means government official and only government official. At the very outset of the United States Code Annotated, Section 1 states:

> "In determining the meaning of any Act of Congress, unless the context indicates otherwise * * *

> "The words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies and joint stock companies, as well as individuals. * * * 'officer' includes any person authorized by law to perform the duties of the office. * * *" 62 Stat. 859.

Again note the recognized non-identity of "person" and "officer".

Throughout the Code definitions are similar. 2 U. S. C. A. Section 261(c) states:

> "The term 'person' includes an individual, partnership, committee, association, corporation, and any other organization or group of persons." 60 Stat. 839.

5 U. S. C. A. 1001(b) states:

> "'Person' includes individuals, partnerships, corporations, associations or public or private organizations of any character other than agencies. * * *" 62 Stat. 99.

6 U. S. C. A. 15 provides:

> "* * * The term 'person' in this section means an individual, a trust or estate, a partnership or a corporation. * * *" 61 Stat. 646.

The following sections are in accord: 4 U. S. C. A. Section 110; 6 U. S. C. A. Section 618; 7 U. S. C. A. 242, 504, 608a (9); 15 U. S. C. A. Section 80a-2, 80b-2, 431, 715a, 717a, 901, 1127; 16 U. S. C. A. Section 631a, 690h, 721, 796, 851; 21 U. S. C. A. Section 171, 188a, 321; 22 U. S. C. A. Section 611; 26 U. S. C. A. Section 145, 894, 1426, 1532(i), 1607(k), 1718, 1805, 1821, 3124, 3507, 3710(c), 3793(b), 3797; 29 U. S. C. A. Section 152, 203; 33 U. S. C. A. Section 466a; 35 U. S. C. A. Section 42c; 41 U. S. C. A. Section 52, 103;

42 U. S. C. A. Section 1818; 46 U. S. C. A. Section 316; 49 U S. C. A. Section 1(3), 401, 902; 50 App. U. S. C. A. Section 38, 985, 1161, 1502, 1892.

E. Legislative History.

To satisfy this test, although those submitted above should more than suffice, one need only make reference to the Legislative History of 47(3) set forth in the opinion of the Court below at page 311.

F. If Ambiguity Exists, Public Policy Dictates Respondents' Construction of "Person".

It is impossible to see how any interpretation, other than respondents', of the word "person" is possible. However, if doubt exists, it should be resolved in favor of a meaning most consistent with public policy. For this proposition, the following excerpt from a leading treatise on statutory interpretation adduces ample support:

> *Section 5901:*
>
> Public policy retains a place of great importance in the process of statutory interpretation and the tendency of the courts has always been to favor an interpretation which is consistent with public policy. In fact it may be safely asserted that the bases of all the interpretative rules in regard to strict and liberal interpretation are founded upon public policy in one form or another. Although public policy, in the abstract, is a vague and indefinite term incapable of accurate and precise definition, it often serves as a concise expression for a combination of factors which exercise a tremendous influence in the formation interpretation, and application of legal principles. * * *
>
> In its strict sense public policy reflects the trends and commands of the federal and state constitutions, statutes and judicial decisions. In its broad sense public policy may be traced to the current public

sentiment towards public morals, public health, public welfare and the requirements of modern economic, social and political conditions.

It will be observed that the principles of strict and liberal statutory construction are founded upon the same or cognate factors. Therefore, public policy has no separate significance in statutory interpretation, but instead, the rules of strict and liberal interpretation are expressions of public policy. However, it is natural and very common for the courts to regard policy as a separate aid to interpretation, and for that reason, it is expedient to consider here the counterparts of public policy and how they affect statutory interpretations.

Section 5902:

Constitutional legislation which is highly responsive to current demands serves as an extremely valuable source of public policy. Thus a statute is generally given a meaning consistent with its purpose or spirit which it is commonly associated with, and serves as an indicia of public policy. * * *

Section 5904:

In this country the most reliable source of public policy is to be found in the federal and state constitutions. Since constitutions are the superior law of the land and because one of their outstanding features is flexibility and capacity to meet changing conditions, constitutional policy provides a valuable aid in determining the legitimate boundaries of statutory meaning. Thus public policy having its inception in constitutions may accomplish either a restricted or extended interpretation of the liberal expression of a statute. 3 Sutherland, Statutory Construction (1943).

To a similar effect see CRAWFORD, The Construction of Statutes 1940, page 374.

The public policy of the United States relating to freedom of expression is clear. It is best set forth in those opinions of the Supreme Court which state that the presumption of constitutionality normally applicable to legislation does not apply when a civil liberty is threatened. The presumption is an outgrowth of what has been called Justice HOLMES' philosophy of "judicial laissez faire". (LERNER, *"The Mind and Faith of Justice Holmes,"* (1943), 127). That is, a choice among the infinite number of social remedies should be left almost entirely to the legislature, which responds to the electorate, not to the courts. The presumption, therefore, means that there is a wide area in which the authority of the legislature will be upheld, even though the Court might disagree with legislative conclusions.

However, a necessary adjunct to the theory of the loosely fettered legislature is that it shall be subject to political restraint. For this it is necessary to have an electorate capable of exerting the corrective force. Therefore any impairment of the effectiveness of the electorate is viewed more carefully by the Court. To this effect see *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n. 4; *Thornhill* v. *Alabama*, 310 U. S. 88, 95; *Thomas* v. *Collins*, 323 U. S. 516, 530; *Bridges* v. *California*, 314 U. S. 252, 262-263; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639. "The underlying theory of the court appears to be that if, by striking down interferences in respect to matters of the mind, it can keep the market place of ideas open and the polling booths accessible, it will rely upon the ordinary political processes to prevent abuse of power in the regulation of economic affairs." (DOWLING, *Constitutional Law*, 1946.)

Mr. Justice FRANKFURTER, concurring in *Kovacs* v. *Cooper*, 93 L. Ed. 379, 387 (1943), discussed the line of

opinions which have asserted that freedom of speech deserves at least a "preferred" position under the First and Fourteenth Amendments. Although he rejects as misleading such terminology as "preferred position" or "presumptively unconstitutional", he apparently joins in this rationale of the cases:

> "The philosophy of his opinions on that subject arose from a deep awareness of the extent to which sociological conclusions are conditioned by time and circumstance. Because of this awareness Mr. Justice Holmes seldom felt justified in opposing his own opinion to economic views which the legislature embodied in law. But since he also realized that the progress of civilization is to a considerable extent the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other beliefs, for him the right to search for truth was of a different order than some transient economic dogma. And without freedom of expression, thought becomes checked and atrophied. Therefore, in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. Accordingly, Mr. Justice Holmes was far more ready to find legislative invasion where free inquiry was involved than in the debatable area of economics." *Kovacs* v. *Cooper, supra.*

Attorney General, now Mr. Justice Clark, stated the same policy somewhat differently in a recent article:

> "Our democracy suffers a grievous, if not a fatal, blow when the processes of law and order are broken down by mob violence. The federal government must not stand idly by when a few reckless men in a com-

munity disclaim their obligation to society and, flouting the priceless heritage of equality of all men, undertake to substitute lynch law for due process of law. (CLARK, "A Federal Prosecutor Looks at the Civil Rights Statutes", 47 Col. 175, 185 (1947).)

Therefore, although it is difficult to see how any serious ambiguity could exist, any uncertainties should be resolved in the direction of the preservation of free expression.

Conclusion.

The judgment of the Circuit Court of Appeals should be upheld.

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